

FEDERAL AGENCIES IN THE LEGISLATIVE PROCESS: TECHNICAL ASSISTANCE IN STATUTORY DRAFTING



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INTRODUCTION

Federal agencies draft statutes. Indeed, they are often the chief architects of the statutes they administer.¹ Even when federal agencies are not the primary substantive authors, they routinely respond to congressional requests to provide technical assistance in statutory drafting. Yet despite their substantial role in the legislative process, our understanding about how agencies interact with Congress is greatly undertheorized and perhaps even less understood empirically. This Report, which was commissioned by the Administrative Conference of the United States (ACUS),² explores the latter role of federal agencies in the legislative process: the provision of technical assistance in statutory drafting.

To be sure, many have recognized over the years that the administrative state plays an expansive role in drafting legislation for Congress. For instance, Felix Frankfurter observed back in 1942 that “[f]rom the very beginning of our government in 1789, federal legislation like that now under review has usually not only been sponsored but actually drafted by the appropriate executive agency.”³ In 1961, James Craig Peacock echoed Justice Frankfurter’s observation:

For it cannot be overlooked that, in Washington, at least, the extent to which the spade work of the actual drafting of important legislation has been shifted all the way back to the agency level, is a major phenomenon of present day government. . . . Indeed, the executive branch of the Government is no longer even expected to confine itself to the mere making of recommendations or proposals. It is practically expected to implement them in the form of already drafted bills.⁴

¹ Agency interpretations of those statutes, moreover, receive generous judicial deference, *see* *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (deferring to an agency’s reasonable interpretation of an ambiguous statute that the agency administers), with agency interpretations of these interpretations receiving even more deference. *See* *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (according an agency’s interpretation of its own regulation “controlling weight unless it is plainly erroneous or inconsistent with the regulation”); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (same).

² This Report was prepared for the consideration of the Administrative Conference of the United States. The opinions, views, and recommendations expressed are those of the Author and do not necessarily reflect those of the members of the Conference or its committees, except where formal recommendations of the Conference are cited.

³ *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 177 (1942) (Frankfurter, J., dissenting); *see also* JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 221 (2012) (noting how, in the 1800s, “Congress often depended upon the departments to draft major legislation,” including that Congress requested the Department of Treasury to draft the legislation that created the Department of Interior); Lisa Schultz Bressman, *Chevron’s Mistake*, 58 *DUKE L.J.* 549, 582-84 (2009) (discussing agency involvement in drafting legislation and sharing interpretations); Robert A. Katzmann, *Madison Lecture: Statutes*, 87 *N.Y.U. L. REV.* 637, 656-61 (2012) (discussing briefly the role of federal agencies in the legislative process); Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890-1950*, 123 *YALE L.J.* 266, 340-41 (2013) (discussing the role of federal agencies during the 1890-1950 period in preparing bills, appearing at committee hearings, and helping to develop a bill’s legislative history); Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 *CHI.-KENT L. REV.* 321, 347-49 (1990) (discussing significance of the agency’s relationship to Congress in legislative process).

⁴ JAMES CRAIG PEACOCK, *NOTES ON LEGISLATIVE DRAFTING* 2-3 (1961); *accord* DONALD HIRSCH, *DEPT OF HEALTH & HUMAN SERVS., DRAFTING FEDERAL LAW* 1 (1980) (“Virtually all major programs of federal financial

In other words, “[b]ecause agencies have day-to-day experience with the legal, political, and operational aspects of the laws,” as Clinton Brass of the Congressional Research Service has more recently explained, “[i]t is not surprising that a fair proportion of the legislation that is considered in the legislative process tends to have been drafted or influenced at some point by executive branch employees, including both career civil servants and political appointees.”⁵

Recent empirical work has shed some additional light on the role of federal agencies in the legislative process. For instance, Lisa Bressman and Abbe Gluck have surveyed over one-hundred congressional drafters and reported that the congressional “respondents told us that first drafts are typically written by, respectively, the White House and agencies, or policy experts and outside groups, like lobbyists,” but that “[e]mpirical work is lacking for the details of this account”⁶ The Author of the Report has similarly surveyed over one-hundred federal agency rule drafters (not agency legislative drafters), and their responses reinforce that federal agencies play an important and substantial role in the legislative process.⁷ For example, four in five (78%) agency rule drafters surveyed indicated that their agency always or often participates in a technical drafting role for the statutes it administers (with another 15% indicating sometimes), and three in five (59%) reported that their agency always or often participates in a policy or substantive drafting role for the statutes the agency administers (with another 27% indicating sometimes).⁸ In other words, recent empirical work confirms what has long been noted anecdotally in the literature and what anyone who has participated in the federal legislative process no doubt has observed firsthand: federal agencies are involved regularly and extensively in the legislative process.

assistance, and most of the significant regulatory statutes, have in their ancestries a proposal made to Congress by an executive agency, customarily in the form of a draft bill. Generally speaking, these proposals are developed with greater formality than bills written within Congress.”).

⁵ Clinton T. Brass, *Working in, and Working with, the Executive Branch*, in LEGISLATIVE DRAFTER’S DESKBOOK: A PRACTICAL GUIDE 275 (Tobias A. Dorsey ed., 2006); accord JACK DAVIES, LEGISLATIVE LAW AND PROCESS NUTSHELL § 25-3 (2007) (noting that “[g]overnment agencies bring many bills to every legislature”); Peter L. Strauss, “Deference” Is Too Confusing—Let’s Call Them “Chevron Space” and “Skidmore Weight,” 112 COLUM. L. REV. 1143, 1146 (2012) (observing that “[t]he agency may have helped to draft the statutory language, and was likely present and attentive throughout its legislative consideration”).

⁶ Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 758 (2014); see also Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 998-1011 (2013) (detailing survey findings of congressional drafters on agency involvement in legislative process); accord Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 600 (2002) (discussing responses from case study of legislative drafting in the Senate Judiciary Committee about the role of agency officials in drafting statutes and conducting legal research).

⁷ Christopher J. Walker, *Inside Agency Interpretation*, 67 STAN. L. REV. 999, 1036-38 (2015) (detailing agency rule drafter survey findings with respect to the role of federal agencies in the legislative process).

⁸ *Id.* at 1037 & fig.6. These responses are no doubt conservative estimates of agency involvement with Congress, as the agency officials surveyed were regulatory personnel, not necessarily agency officials who are actively involved in the legislative process. See *id.* (noting lower rates of personal participation in the legislative process from the agency rule drafters surveyed). Moreover, one in four respondents (24%) indicated their agency participates “in drafting legislative history (e.g., floor statements, committee reports, conference reports, hearing testimony and questions, etc.) of statutes the agency administers.” *Id.* at 1037-38.

Moreover, in the 1970s several empirical studies were conducted on the role of federal agencies in drafting substantive legislative proposals.⁹ Perhaps the most ambitious study to date comes from the American Bar Association’s Standing Committee on Legislative Drafting, which under the direction of Reed Dickerson commissioned the editors of the *Catholic University Law Review* to conduct interviews and develop case studies on how federal agencies draft and advocate for agency-initiated substantive legislation. The *Catholic University Law Review* published its nearly 200-page report in 1972.¹⁰ The report presented findings as to the role of the administrative state in the legislative process at seven federal agencies: the Department of Defense; the Department of Housing and Urban Development; the Department of Justice; the Department of Transportation; the Department of Health, Education, and Welfare; the Federal Trade Commission; and the Office of Management and Budget.¹¹ Like nearly all of the scholarship and empirical work done to date,¹² these rich case studies focused almost exclusively on agency-initiated substantive legislation.¹³

Since the 1970s there has been little further empirical exploration into the role of federal agencies in the legislative process—despite a growing theoretical literature calling for a more purposivist approach to agency statutory interpretation based in part on the premise that federal agencies are heavily involved in the legislative process and thus have comparative expertise in legislative process and history compared to the courts.¹⁴ An important recent exception to this

⁹ See DAVIES, *supra* note 5, § 25-3 (focusing solely on “[a]gency bill making”); HIRSCH, *supra* note 4, at vii (explaining that this book was prepared “to train program lawyers of what used to be the Department of Health, Education, and Welfare, so that under the guidance of experienced legislative draftsmen they could help write the bills, in the areas of their counseling experience, for HEW’s annual legislative program”); PROFESSIONALIZING LEGISLATIVE DRAFTING: THE FEDERAL EXPERIENCE 5-95 (Reed Dickerson ed., 1973) (exploring further agency-initiated substantive legislation); Brass, *supra* note 5, at 271-93 (focusing primarily on agency’s role in substantive legislative activities); Robert S. Gilmour, *Central Legislative Clearance: A Revised Perspective*, 31 PUB. ADMIN. REV. 150, 150-58 (1971) (exploring the process within the agency that takes place prior to seeking legislative clearance from the Executive Office of the President).

¹⁰ *The Catholic University Study of Federal Legislative Drafting in the Executive Branch*, 21 CATH. U. L. REV. 703 (1972) [hereinafter *CULR Report*].

¹¹ *Id.* at 709-10.

¹² See sources cited *supra* note 9.

¹³ *CULR Report*, *supra* note 10, at 705-06 (explaining that the ABA-commissioned study “concentrate[d] on legislative proposals originating in about a half dozen representative agencies”).

¹⁴ See, e.g., William N. Eskridge, Jr., *Expanding Chevron’s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411, 427 (arguing that agencies should “read statutes broadly, in light of their purposes, and follow a quasi-legislative political process for interpretations addressing big policy questions or arenas not resolved by the statute”); Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 537 (2005) (finding “persuasive grounds for believing that legitimate techniques and standards for agency statutory interpretation diverge sharply from the legitimate techniques and standards for judicial statutory interpretation”); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 91-99 (1985) (arguing that delegation of policy decisions to agencies is better than delegation to courts based on comparative accountability, responsiveness, and legitimacy); Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. REV. 871, 875 (2015) (taking argument further by asserting that Congress directs agencies to engage in purposivist statutory interpretation); Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 321-22 (1990) (arguing that “the use of legislative history may have an importance in the agency context for maintaining law against politics, however one regards its use at the judicial level”); Cass R. Sunstein & Adrian

scholarly void is a study conducted by Jarrod Shobe in 2014, in which he interviewed fifty-four agency staffers involved in legislative matters at fourteen executive departments and eleven independent agencies.¹⁵ The Shobe study consisted of fifty-five questions (many with subquestions) that explored broadly the role of federal agencies in the legislative process, including some exploration of their role in providing technical drafting assistance.¹⁶ Those findings, where relevant, will be discussed throughout the Report.

Despite some prior investigation into the role of federal agencies in proposing substantive legislation for congressional consideration, virtually no work has been done to document the role of the administrative state in providing Congress with technical assistance in statutory drafting. It turns out that the vast majority of legislative drafting conducted by federal agencies today is not agency-initiated substantive legislation, but technical responses to congressional requests for review of proposed legislation. In other words, unlike substantive legislative activity, when agencies engage in technical drafting assistance they provide feedback on congressionally drafted legislation without taking a substantive position on the legislation.¹⁷ Yet very little is publicly known about how agencies interact with Congress in providing technical drafting assistance, or how agencies interact internally to help their congressional liaisons leverage the expertise of the whole agency in such efforts.

This Report focuses on that technical drafting assistance process. To better understand the process, the Author met with agency officials at some twenty executive departments and independent agencies for a total of over sixty hours of interviews. Ten of these agencies agreed to participate on the record: the Departments of Agriculture, Commerce, Homeland Security, Education, Energy, Health and Human Services, Housing and Urban Development, and Labor as well as the Federal Reserve and the Pension Benefit Guaranty Corporation. Individual overviews of these agencies' processes for providing technical drafting assistance are included as Appendices B-K to this Report. Subsequent to the interviews, the participating agencies responded to an anonymous follow-up survey that consisted of forty questions concerning their technical drafting assistance processes and practices. The survey and full responses are reproduced as Appendix A.

Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 928 (2003) (arguing that “attention to institutional considerations can show why agencies might be given the authority to abandon textualism even if courts should be denied that authority”).

¹⁵ Jarrod Shobe, *Agencies as Legislators: An Empirical Study of the Role of Agencies in the Legislative Process*, at 3-4 (Aug. 27, 2015), <http://ssrn.com/abstract=2652520>.

¹⁶ *Id.* at 10-12.

¹⁷ As further discussed in Part I.B, the Office of Management and Budget (OMB) contemplates that federal agencies will provide technical drafting assistance and does not require OMB preclearance of such technical feedback. Instead, it merely instructs agencies to keep OMB apprised of such activities and to make clear to the congressional requester that the agency feedback does not represent the substantive views of the agency or the administration. *See* OFFICE OF MGMT. & BUDGET, CIRCULAR A-19: LEGISLATIVE COORDINATION AND CLEARANCE § 7(l) (revised Sept. 20, 1979), https://www.whitehouse.gov/omb/circulars_a019/ [hereinafter OMB CIRCULAR A-19]. To do that, agencies typically provide a disclaimer along the following lines: “NOTE: This technical drafting assistance is provided in response to a congressional request and is not intended to reflect the viewpoint or policies of any element of the Agency, the Department, or the Administration.”

The Report proceeds as follows: Part I provides a brief overview of the role of federal agencies in the legislative process: their substantive legislative activities which the Office of Management and Budget (OMB) preclears per OMB Circular A-19 (Part I.A), the agencies' provision of technical assistance in statutory drafting (Part I.B), and their role in the budget and appropriations process as related to providing technical drafting assistance (Part I.C).

Part II presents the study findings based on the agency interviews and anonymous follow-up survey. After detailing the study methodology in Part II.A, Part II.B presents the general findings on the technical drafting assistance process—including details on the congressional requesters and types of requests and responses, the rate of technical drafting assistance requests, the factors that affect whether the agency decides to provide assistance and whether Congress adopts the agency response, and which actors within the agency are involved in developing the process. Part II.C briefly surveys the general agency organizational models for providing technical assistance: the predominant centralized legislative counsel model; the decentralized agency experts model; and the centralized legislative affairs model that seems more common at independent agencies. Part II.D presents the findings regarding common challenges the agencies identified in providing technical drafting assistance—the challenges inside the agency, those related to their congressional counterparts, and those implicated by the technical-substantive line drawn by OMB Circular A-19.

Part III turns to discussing the best practices that certain agencies have developed to address these challenges and proposes recommendations for the Administrative Conference of the United States to consider. These recommendations focus both on internal agency practices to improve the technical drafting assistance process and on external practices that may strengthen agencies' relationship with Congress in the legislative process. The Report concludes by briefly mapping out the next steps in empirical and theoretical research needed to better understand the role of federal agencies in the legislative process.

I. BACKGROUND: FEDERAL AGENCIES IN THE LEGISLATIVE PROCESS

This Part briefly reviews the variety of ways in which federal agencies participate in the legislative process. Although this Report focuses on how federal agencies respond to congressional requests for technical assistance in statutory drafting, it is helpful to situate that process within the administrative state's larger legislative role. Part I.A addresses the ways in which federal agencies engage in substantive legislative activity, which in the context of executive agencies is generally governed by the OMB Circular A-19 preclearance process. Part I.B turns to the technical drafting assistance process—the main subject of the Report—which concerns the agency's role in providing technical feedback on congressionally drafted legislation without taking an official substantive position on the legislation. Part I.C briefly outlines the role of federal agencies in the appropriations and budget process. The focus in this Part is on executive agencies, and the nuances implicated by independent agencies are further explored in Part II and in the agency-specific overviews contained in Appendices B-K.

A. Federal Agencies and Substantive Legislative Activities

To understand the role of federal agencies in substantive legislative drafting, it is helpful to first understand the President's role. The President's legislative function finds its roots in the Constitution. In particular, Article II, Section 2, instructs that the President "shall from time to time give to the Congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient."¹⁸ The former clause is now exercised by the traditional State of the Union address, whereas the latter is often called the Recommendations Clause and involves the President's direct, substantive role in the legislative process.¹⁹ Combined with the presidential veto power,²⁰ the Supreme Court has explained that these constitutional provisions "limit[] [the President's] functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute."²¹

Moreover, the President's influence and control over the administrative state have constitutional roots that help explain the President's (and the administrative state's) substantive role in the legislative process. In particular, Article II, Section 3, instructs that the President "shall take Care that the Laws be faithfully executed,"²² and Article II, Section 2, further provides that the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."²³ In other words, the President has a duty to ensure that the executors of the law—including the federal regulatory state—do so faithfully, and the President has the power to request the substantive views of federal agencies within their areas of expertise. These additional constitutional duties and powers help the President advance the Executive's substantive legislative agenda under the Recommendations Clause.

In an April 2013 memorandum to all heads of departments and agencies, the President's OMB reinforced these constitutional foundations for the President's legislative clearance function:

The President's legislative responsibilities are founded in his constitutional duties and powers to: (1) require the opinion in writing of the principal officer in each of the Executive departments; (2) take care that the laws are faithfully executed; (3) give the Congress

¹⁸ U.S. CONT. art. II, § 3.

¹⁹ See Brass, *supra* note 5, at 274; see also J. Gregory Sidak, *The Recommendation Clause*, 77 GEO. L.J. 2079, 2081-82 (1989) (noting that "James Madison's notes on the Constitutional Convention for August 24, 1787, reveal that the Framers explicitly elevated the President's recommendation of measures from a political prerogative to a constitutional duty").

²⁰ U.S. CONT. art. I, § 7 ("Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. . . .").

²¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

²² U.S. CONT. art. II, § 3.

²³ U.S. CONT. art. II, § 2.

information on the State of the Union; (4) recommend to the Congress such measures as he judges necessary; (5) approve or disapprove bills passed by the Congress; and (6) convene either or both houses of Congress.

The legislative recommendations of the President in his three regular annual messages—State of the Union, Budget, and the Economic Report—together with those in any special messages or other communications to the Congress generally constitute the President’s legislative program. These recommendations often originate in the agencies, the Congress, and commissions, panels, and task forces established by law or by administrative order.²⁴

OMB Circular A-19, which was last amended over three decades ago in 1979, sets forth the guidelines for the Executive’s legislative coordination and clearance process.²⁵ Within OMB, the Legislative Reference Division is in charge of the Circular A-19 process and “coordinates the articulation of the Administration’s position on legislation by overseeing the review and clearance of the Administration’s legislative proposals, testimony, and statements on bills progressing through Congress.”²⁶ Circular A-19 applies to all Executive Branch agencies unless exempt by statute,²⁷ and as federal agencies understand it, Circular A-19 requires OMB preclearance of all “substantive” legislative activities in which those agencies engage.

Although an exhaustive treatment of the Circular A-19 preclearance process lies outside the ambition of this Report, it is worth outlining the types of legislative activities contemplated for OMB coordination and preclearance. First, federal agencies must submit annually their legislative program (or lack thereof) for coordination and clearance purposes.²⁸ Second, agencies must submit for OMB preclearance any “proposed legislation,” which is defined broadly to include “[a] draft bill or any supporting document (e.g., Speaker letter, section-by-section analysis, statement of purpose and justification, etc.) that an agency wishes to present to Congress for its consideration” as well as “any proposal for or endorsement of Federal legislation” that the agency desires “to transmit to

²⁴ Memorandum from the Office of Mgmt. & Budget on Legislative Coordination and Clearance to the Heads of Departments and Agencies, M-13-12, at 2 (Apr. 15, 2013) <https://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-12.pdf> [hereinafter OMB April 2013 Memo].

²⁵ OMB CIRCULAR A-19, *supra* note 17.

²⁶ *The Mission and Structure of the Office of Management and Budget*, OFFICE OF MGMT. & BUDGET, https://www.whitehouse.gov/omb/organization_mission/ [hereinafter OMB Mission and Structure].

²⁷ OMB CIRCULAR A-19, *supra* note 17, § 4 (“All executive branch agencies (as defined in section 5b) are subject to the provisions of this Circular, except those agencies that are specifically required by law to transmit their legislative proposals, reports, or testimony to the Congress without prior clearance. OMB will, however, honor requests from such agencies for advice on the relationship of particular legislation, reports, or testimony to the program of the President. The municipal government of the District of Columbia is covered to the extent that legislation involves the relationship between it and the Federal Government. Agencies of the legislative and judicial branches are not covered by this Circular.”); *see also* Brass, *supra* note 5, at 291 (detailing agencies with legislative “bypass” authority).

²⁸ OMB CIRCULAR A-19, *supra* note 17, § 6 (detailing the requirements for the agency legislative program submission); *see also* Brass, *supra* note 5, at 288-89.

Congress, or to any Member or committee, officer or employee of Congress, or staff of any committee or Member, or to make available to any study group, commission, or the public.”²⁹

Third and related, this OMB preclearance requirement applies to any agency “report,” which includes “[a]ny written expression of official views prepared by an agency on a pending bill for (1) transmittal to any committee, Member, officer or employee of Congress, or staff of any committee or Member, or (2) presentation as testimony before a congressional committee.”³⁰ For agency-proposed legislation and reports, OMB then engages in an extensive clearance and coordination process—sometimes even initiating interagency consultation and coordination³¹—before the agency can transmit that proposed legislation or report to Congress (though there are narrow exceptions and separate procedures for time-sensitive legislative matters).³²

Finally, Circular A-19 provides the process by which the President receives substantive feedback from federal agencies on enrolled bills for presentment and veto purposes. When OMB requests an agency’s views on an enrolled bill, the agency will provide written feedback, including whether it approves, how the enacted bill would affect existing law, whether a signing statement should be issued, and so forth.³³ Although not expressly detailed in Circular A-19, OMB has a similar process for soliciting agency feedback to be included in “Statements of Administration Policy (SAPs)” on pending bills:

OMB prepares SAPs for major bills scheduled for House or Senate floor action in the coming week, including those to be considered by the House Rules Committee. In addition, SAPs are sometimes prepared for so-called “noncontroversial” bills considered in the House under suspension of the rules. SAPs are prepared in coordination with other parts of OMB,

²⁹ OMB CIRCULAR A-19, *supra* note 17, § 5(c) (defining “proposed legislation”); *see id.* § 7 (detailing the requirements for “[s]ubmission of agency proposed legislation and reports” for OMB review); *see also* Brass, *supra* note 5, at 289-90.

³⁰ OMB CIRCULAR A-19, *supra* note 17, § 5(e) (defining “proposed legislation”); *see id.* § 7 (detailing the requirements for “[s]ubmission of agency proposed legislation and reports” for OMB review). OMB Circular A-19 also defines “report” to include “any comment or recommendation on pending legislation included in an agency’s annual or special report that an agency proposes to transmit to Congress, or any Member or committee, or to make available to any study group, commission, or the public.” *Id.* § 5(e).

³¹ *See id.* § 9 (detailing interagency consultation process).

³² *See id.* § 8 (detailing OMB clearance process for agency proposed legislation and reports). For more on the OMB clearance process, based on interviews with agency officials, *see* Shobe, *supra* note 15, at 30-34 [Part II.D].

³³ OMB CIRCULAR A-19, *supra* note 17, § 10; *see also* OMB April 2013 Memo, *supra* note 24, at 3 (“To assist the President in deciding his course of action on a bill, OMB requests each interested agency to submit within 48 hours its analysis and recommendation in a letter to OMB. Such views letters are signed by the head of the agency or other Presidential appointee. OMB prepares a memorandum to the President on the enrolled bill which transmits these views letters and summarizes the bill, significant issues, and various agency and OMB recommendations. If an agency recommends disapproval, it is responsible for preparing a draft of an appropriate statement for the President’s consideration.”).

the agency or agencies principally concerned, and other EOP units. Following its clearance, a SAP is sent to Congress by OMB's Legislative Affairs Office.³⁴

As Clinton Brass of the Congressional Research Service explained, “The purpose of a SAP (usually pronounced ‘sap’) is to communicate to Congress the coordinated views of the President and agencies regarding a piece of legislation.”³⁵ These SAPs are publicly available on OMB's website.³⁶

In sum, federal agencies play a significant and important substantive role in the legislative process—a role that, at least with respect to executive agencies, is coordinated and precleared by the President through OMB's Legislative Reference Division.

B. Federal Agencies and Technical Assistance in Legislative Drafting

OMB Circular A-19, however, also contemplates that federal agencies play an important role in providing technical assistance in statutory drafting. Such technical drafting assistance goes through a different process. Indeed, as discussed in Part II, federal agencies often receive congressional requests—from committee staffers, staffers for individual Members of Congress, or Members themselves—for technical assistance in statutory drafting. These requests can range from review of draft legislation to (less common) requests for the agency to draft legislation from scratch based on specifications provided by the congressional requester. And the agency responses can vary for oral communications of general feedback or written memoranda summarizing the key feedback to suggested legislative language or redlined suggestions on the draft legislation.³⁷

Unlike substantive legislative activities that require OMB preclearance, Circular A-19 instructs that “[a]gencies need not submit for clearance bills that they prepare as a drafting service for a congressional committee or a Member of Congress, provided that they state in their transmittal letters that the drafting service does not constitute a commitment with respect to the position of the

³⁴ OMB April 2013 Memo, *supra* note 24, at 3. OMB's Office of Legislative Affairs is separate and distinct from the Legislative Reference Division and serves as OMB's liaison with the Hill and the legislative affairs offices throughout the federal administrative state. The Office's involvement with Congress includes “disseminat[ing] budget materials, descriptions of relevant concerns, and statements to Congress to communicate the Administration's positions.” OMB Mission and Structure, *supra* note 26. The Legislative Reference Division, by contrast, “coordinates the articulation of the Administration's position on legislation by overseeing the [Circular A-19] review and clearance of the Administration's legislative proposals, testimony, and statements on bills progressing through Congress.” *Id.*

³⁵ Brass, *supra* note 5, at 277; *see also id.* at 277-78 (discussing SAPs further).

³⁶ OFFICE OF MGMT. & BUDGET, STATEMENTS OF ADMINISTRATION POLICY ON NON-APPROPRIATIONS AND APPROPRIATIONS BILLS, https://www.whitehouse.gov/omb/legislative_sap_default.

³⁷ *See generally* Brass, *supra* note 5, at 276-77 (“While the development of legislative proposals by the executive branch is a process that originates within the executive branch itself, another process, usually called ‘executive branch comment on legislation,’ originates within the legislative branch. At the discretion of actors within the legislative branch, and especially its committees, a legislative branch actor contacts an executive agency to solicit information and policy preferences on legislation. This can be done formally (with a letter or email to an agency official) or informally (by telephone or in person).”); *accord* Shobe, *supra* note 15, at 33-34 [Part II.D].

Administration or the agency.”³⁸ Based on the Author’s review of a number of agency responses to technical drafting assistance requests, this disclaimer states something along the following lines:

NOTE: This technical drafting assistance is provided in response to a congressional request and is not intended to reflect the viewpoint or policies of any element of the Agency, the Department, or the Administration.

Although technical drafting assistance need not be precleared by OMB, Circular A-19 instructs agencies to advise OMB of such drafting requests—and forward a copy of requests when made in writing—as well as to provide OMB with the agency’s response “at the time of transmittal, together with an explanatory statement of what the bill would accomplish if that is not contained in the transmittal letter.”³⁹ As further discussed in Part II, it seems that the majority of agencies do not comply with these instructions with respect to the run-of-the-mill technical drafting assistance requests.⁴⁰ Moreover, based on information gathered from the federal agencies, it does not appear that OMB has made any systematic effort to enforce these notice and transmittal requirements.

As detailed in Part II and perhaps contrary to conventional understanding, the bulk of agency legislative drafting today does not come in the form of substantive, agency-initiated legislation, but in the form of responding to congressional requests for technical drafting assistance. Such requests do not go through the formal OMB preclearance process; indeed, most such requests never reach OMB’s radar.

C. Federal Agencies and Appropriations Legislation

Federal agencies are also heavily involved in the budget and appropriations process, but those are governed by a different set of OMB offices and procedures and often involve a different part of the agency (typically the agency’s budget office) than traditional legislative drafting. OMB Circular A-11 governs the federal budget process—a process that involves federal agencies submitting their budget requests and material for OMB consideration to be included in the President’s budget.⁴¹ The extensive OMB budget process lies outside the scope of the Report and has been detailed exhaustively elsewhere.⁴² Similarly, on the congressional side, appropriations legislation is handled separately from authorization and other substantive legislation—a different process, a different set

³⁸ OMB CIRCULAR A-19, *supra* note 17, § 7(i).

³⁹ *Id.*

⁴⁰ See also Brass, *supra* note 5, at 277 (“When responding, agencies do not always clear their responses with OMB under the *Circular A-19* process, sometimes—but not always—to the consternation of OMB. Clearly, it would be infeasible for an agency to clear every telephone call with OMB, but this can be a gray area under the *A-19* process.”); Shobe, *supra* note 15, at 33-34 [Part II.D] (noting that agency respondents indicated that “bills drafted for Congress at Congress’s request are not considered a statement of agency or administration policy, and so agencies are able to avoid the OMB clearance process for this type of draft legislation”).

⁴¹ OFFICE OF MGMT. & BUDGET, CIRCULAR A-11: PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET (June-30, 2015), https://www.whitehouse.gov/omb/circulars_a11_current_year_a11_toc.

⁴² See generally Brass, *supra* note 5, at 285-86 (discussing further the OMB budget process).

of congressional committees in the House and Senate, and a different part of the agency (agency budget offices).⁴³ And the appropriations process has evolved into an important yet unorthodox form of lawmaking.⁴⁴

For the purposes of this Report, however, the legislative process for appropriations cannot be ignored entirely, especially in light of the somewhat modern phenomenon of including substantive provisions or “riders” in appropriations legislation.⁴⁵ As discussed in Part II and detailed more fully in the agency-specific overviews included as Appendices B-K, it has become more critical that agencies provide technical review and drafting assistance on proposed appropriations legislation that include such substantive provisions. Yet, because agency processes for reviewing authorization and appropriations legislation have historically been channeled through different parts of the agency, such coordination to provide technical drafting assistance on appropriations legislation has proved to be a challenge at some agencies.

II. STUDY FINDINGS

A. Study Methodology

As detailed in the Introduction, little information is publicly available on the role of federal agencies in the legislative process, and even less on their role in providing technical drafting assistance. Accordingly, the approach to this Report is necessarily exploratory in nature. To better understand the process, the Author met with agency officials at some twenty executive departments and independent agencies for a total of over sixty hours of interviews. These interviews were free flowing and investigative, although they were based on a preliminary (and evolving) outline developed during preliminary conversations with some agency and congressional staffers as well as the ACUS staff. The vast majority of these interviews took place in person, including all of the initial interviews with the dozen agencies that agreed to participate on the record. To encourage a candid conversation, the interviews were not recorded. For most interviews, however, a law student research assistant or ACUS legal intern accompanied the Author; both of us took extensive notes and, when possible, attempted to capture verbatim the agency officials’ responses.

At ten agencies where we interviewed, officials agreed to participate on the record and to be profiled in this Report: the Departments of Agriculture, Commerce, Homeland Security, Education, Energy, Health and Human Services, Housing and Urban Development, and Labor as well as the

⁴³ For a helpful, basic overview of the federal budget process, see CENTER ON BUDGET POLICY & PRIORITIES, POLICY BASICS: INTRODUCTION TO THE FEDERAL BUDGET PROCESS (Apr. 20, 2015), <http://www.cbpp.org/research/policy-basics-introduction-to-the-federal-budget-process>. See generally BILL HENIFF JR. ET AL., CONG. RESEARCH SERV., INTRODUCTION TO THE FEDERAL BUDGET PROCESS (Dec. 3, 2012), <https://www.fas.org/sgp/crs/misc/98-721.pdf>.

⁴⁴ See generally BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS 111-28 (detailing how the appropriations and budget processes have evolved into a new and predominant form of unorthodox lawmaking).

⁴⁵ See, e.g., Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 84-91 (2006) (detailing the use of appropriations riders to substantively constrain federal agency action).

Federal Reserve and the Pension Benefit Guaranty Corporation. We interviewed a number of officials at these agencies—always including as least one senior attorney who serves as legislative counsel for the agency and often also a senior official from the agency’s legislative affairs office and/or from the agency’s budget or finance office that deals with the appropriations process. Individual overviews for each of these agencies’ processes for providing technical drafting assistance are included as Appendices B-K to the Report. Those overviews have been reviewed by the agencies and their extensive comments have been incorporated; the agencies have also been given a chance to review and comment on earlier drafts of the Report.

Not surprisingly, a number of common themes emerged during these interviews. We also identified a number of areas where it would be helpful to get answers to specific questions from each participating agency and where it may be beneficial to get those answers anonymously. We thus requested that the ten participating agencies respond to a follow-up survey concerning their technical drafting assistance processes and practices. The survey consisted of six main questions with a number of subquestions for a total of forty questions. As discussed in detail in this Part, a number of these questions were designed to confirm some of the general trends that we seemed to uncover during the interview process. The survey was completely anonymous. The survey was administered online via the online survey software Qualtrics, but an electronic version of the survey was also circulated to the agencies in advance to allow them to coordinate a collective response from the appropriate officials. All of the participating agencies responded. The survey instrument also allowed for comments on each question, and the agency respondents provided a dozen such additional comments. The results from the survey are explored in this Part, and the survey and full responses are reproduced in Appendix A.⁴⁶

B. General Findings on Agency Technical Drafting Assistance Process

Although the agencies interviewed have different organizational models for providing technical drafting assistance (Part II.C), face a somewhat varying set of challenges (Part II.D), and have developed a number of distinct best practices (Part III), the general technical drafting assistance process is strikingly similar across the federal agencies analyzed. These findings presented here are organized in roughly chronological order in how technical assistance is requested, provided, and

⁴⁶ In this Report, those questions (and the relevant subquestions) are cited to with a prefix “Q.” Because the main questions build on prior questions and track the technical assistance process chronologically, the six main questions were asked in a fixed order; subquestions were randomized within each main question to minimize response-order effects. *See, e.g.,* Jon A. Krosnick & Duane F. Alwin, *An Evaluation of a Cognitive Theory of Response-Order Effects in Survey Measurement*, 51 PUB. OP. Q. 201 (1987); William S. Sekely & Vicki L. Blakney, *The Effect of Response Position on Trade Magazine Readership and Usage*, J. ADVER. RES., Nov./Dec. 1994, at 53. There are methodological costs to not fully randomizing the survey in that the order may affect the answers, though such effects are typically more an issue with attitudinal studies (which this is not). *See generally* HOWARD SCHUMAN & STANLEY PRESSER, QUESTIONS AND ANSWERS IN ATTITUDE SURVEYS: EXPERIMENTS ON QUESTION FORM, WORDING, AND CONTEXT (1981). Moreover, as noted above, the survey was also distributed in advance in electronic format so that officials at each agency could coordinate the agency’s collective response prior to one official from each agency entering that response into the online survey application. Accordingly, any potential response-order effects could be mitigated by this somewhat unconventional survey methodology.

received. The process at each specific agency is discussed in greater detail in the agency-specific overviews presented in Appendices B-K.

1. Initial Congressional Request

The initial congressional request process is similar across agencies: a staffer for a congressional committee or for an individual Member of Congress—usually the former—reaches out to the agency. Sometimes, though rarely, the request comes from a Member of Congress directly, but oftentimes the request is made by the staffer before the Member has been presented with the draft bill. Likewise, most requests are submitted before the proposed legislation has been introduced in Congress, though sometimes the initial request arrives after the legislation has been introduced during the committee mark-up stage. Sometimes, moreover, the agency offers technical assistance on proposed legislation without an express congressional request. And, of course, the agency routinely remains involved in providing technical drafting assistance as the proposed legislation works its way through the legislative process.

The requester’s initial agency contact is typically the agency’s legislative affairs office—the office that is the agency’s official liaison with Congress and manages all agency communications and interactions with the Hill. The agency officials interviewed, however, underscored that the process is informal and relationship/personality driven. One agency official, for instance, remarked: “When the real work gets done, it’s the subject matter experts at the agency and at the congressional committee that interact. I can guarantee you that they have their direct lines.” Accordingly, it is not at all unusual for a congressional staffer to reach out to agency personnel with whom she has worked previously to get informal feedback on draft legislation. At most agencies, there is a policy—or at least an informal expectation or norm—that the legislative affairs staff is made aware of any such congressional requests, though a number of agency officials interviewed were skeptical that such notice was always provided. As one agency official remarked, congressional staffers “know who to call [at the agency] to get informal advice.” The agency responses to the follow-up anonymous survey were consistent with these observations: All of the agency respondents indicated that the legislative affairs staff always (40%), usually (50%), or often (10%) are involved in the agency’s response.⁴⁷

A number of agency officials, moreover, noted that the agency can often anticipate some congressional requests for technical assistance based on congressional hearings and other meetings with agencies officials. For instance, it is not unusual for the request to be sparked by a congressional hearing where agency officials have testified or by a less formal agency briefing of congressional staffers. As one agency official observed, “If [the agency] briefs something, then Congress often requests TA [technical drafting assistance].”

⁴⁷ Q3(a).

As for the form of the request, the congressional staffer usually has already drafted some proposed legislative language and explains what that language is attempting to accomplish. The staffer expects the agency to provide general feedback on the proposed legislation, oftentimes with suggested edits and redlines to the draft language. Sometimes the congressional requester has not already drafted the legislative language and instead provides the agency with a set of specifications for the legislation, with the expectation that the agency develop the first draft. This latter type of technical assistance request is much rarer.

2. *Rate of Providing Technical Assistance in Drafting Legislation*

The agency officials interviewed uniformly indicated that the number of congressionally drafted bills for which they provide technical assistance is much greater than the number of agency-initiated substantive bills (those that would go through the OMB Circular A-19 preclearance process).⁴⁸ During the interviews there seemed to also be a general consensus that their agency provides technical assistance during the drafting phase on virtually all of the bills that ultimately get enacted that directly affect their agency. They seemed less confident about bills that only indirectly affect their agency, and the feedback was mixed among agencies about appropriations legislation.

To gain further insight into how often agencies provide technical assistance during the drafting process for bills that are introduced in Congress or ultimately enacted (as well as appropriations legislation), the anonymous online follow-up survey asked six questions on those subjects. Figure 1 depicts the responses to those questions.⁴⁹

With respect to introduced legislation that *directly* affects the agency, almost seven in ten respondents indicated that their agency “often” (40%) or “usually” (30%) provides technical assistance in the drafting process. The remainder (30%) indicated “sometimes” with no one reporting “always,” “rarely,” or “never.”⁵⁰ If converted to a composite score, the score would be 4.0 on a 6.0 scale (4.0 = often).⁵¹ When asked the same question about introduced legislation but only about such legislation that *indirectly* affects the agency, the rate unsurprisingly drops: Three in ten (30%) respondents indicated that their agency often provides such technical assistance, with no one indicating usually or always. Three in five (60%) indicated sometimes, and the remainder (10%) rarely—for a composite score of 3.2 (3.0 = sometimes).⁵²

⁴⁸ A number of agency officials interviewed also emphasized that the amount agency-initiated substantive legislation varies by presidential administration, which party controls Congress, whether there is a divided Congress—just to mention a few factors.

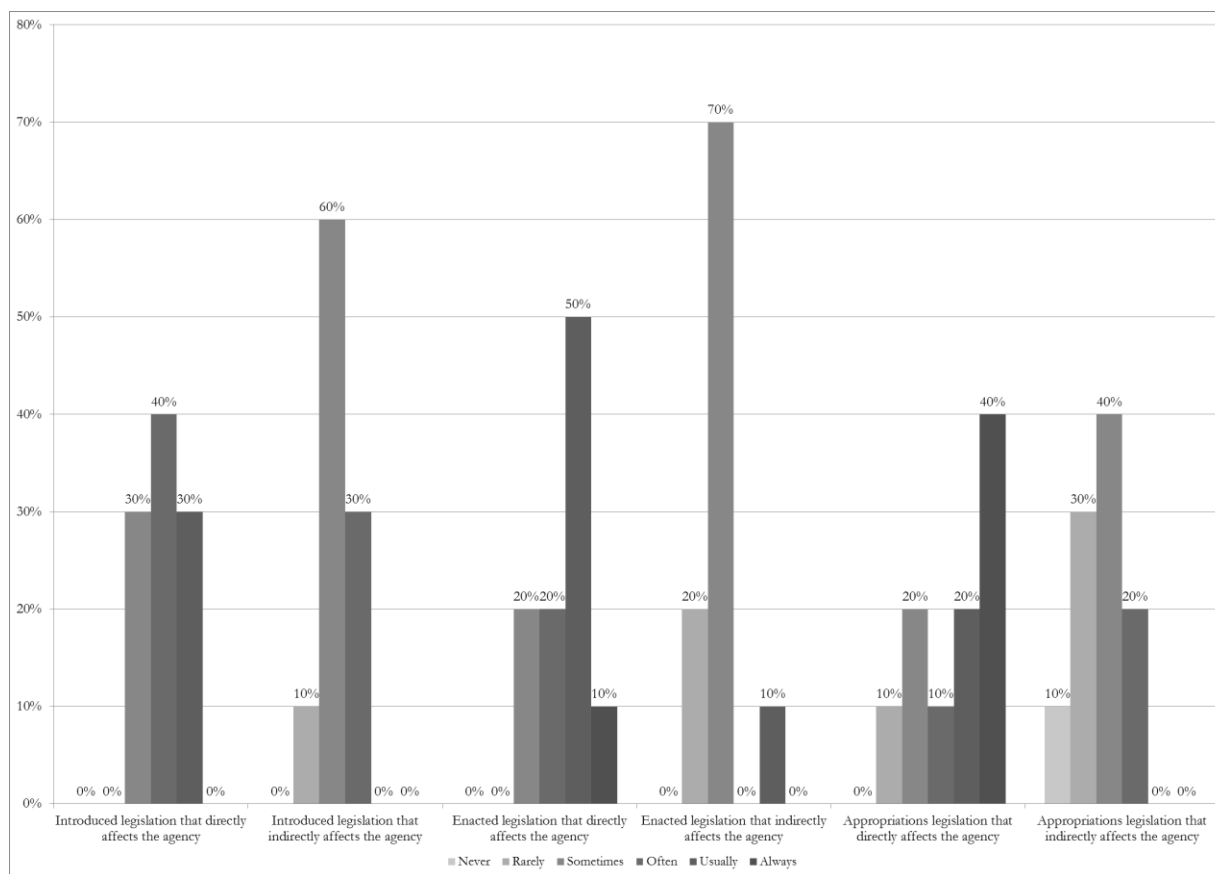
⁴⁹ Q1(a)-(f).

⁵⁰ Q1(a).

⁵¹ Composite scores are calculated by giving 6 points for “always,” 5 points for “usually,” 4 points for “often,” 3 points for “sometimes,” 2 points for “rarely,” and 1 point for “never.” The aggregate is then divided by the total number of respondents for the question.

⁵² Q1(b). “Directly” and “indirectly” were not defined in the survey.

Figure 1. Frequency of Agency Technical Drafting Assistance in the Legislative Process



One would expect the rate of providing technical assistance to be much higher among the bills that are actually enacted, and that is supported by the agency officials surveyed—at least with respect to legislation that directly affects the agency. Four in five respondents indicated that their agency often (20%), usually (50%), or always (10%) provides technical drafting assistance with respect to enacted legislation that directly affects the agency; the remainder (20%) indicated sometimes, for a composite score of 4.5 (4.0 = often; 5.0 = usually).⁵³ (Similar to introduced legislation, the reported rate of providing technical assistance is lower for legislation that only *indirectly* affects the agency.⁵⁴) This finding is consistent with prior empirical work. In particular, of the fifty-four agency staffers involved in legislative matters that were surveyed in 2014 as part of the Shobe study, about two in three staffers surveyed indicated that their agency plays “at least some role” in 100% of the

⁵³ Q1(c).

⁵⁴ Seven in ten (70%) agency respondents indicated that their agency sometimes provides technical assistance during the drafting process on enacted legislation that *indirectly* affects the agency, with the remainder indicating either rarely (20%) or usually (10%)—for a composite score of 3.0 (3.0 = sometimes). This composite score is strangely lower than the score (3.2) for introduced legislation that *indirectly* affects the agency. Q1(d).

legislation that is enacted in the areas covered by the agency with nearly all of the remaining staffers indicating that their agency plays at least some role in 75-99% of such enacted legislation.⁵⁵

During the interviews, a number of agency officials indicated that a common challenge to providing technical assistance in legislative drafting is that appropriations legislation often includes substantive provisions, yet the appropriations process is separate and distinct from the regular legislative process. As such, appropriations may not always go through the traditional technical review process at the agency. Our follow-up survey casts some doubt on whether those challenges continue to frustrate agency technical assistance efforts. With respect to appropriations legislation that directly affects the agency, seven in ten respondents indicated that their agency often (10%), usually (20%), or always (40%) provides technical assistance, with a fifth (20%) indicating sometimes and the remainder (10%) rarely.⁵⁶ Although the composite score of 4.6 is roughly the same as for enacted legislation that directly affects the agency (4.5), the rate of respondents who indicated that the agency always (40%) provides such technical assistance is by far the highest of the six questions. By contrast, with a composite score of only 2.7 (2.0 = rarely; 3.0 = sometimes), the agency respondents indicated that their agency is least involved in providing technical assistance on appropriations legislation that only *indirectly* affects the agency.⁵⁷

In sum, based on the agency interviews and follow-up survey responses, it seems reasonable to conclude that federal agencies often provide technical drafting assistance on legislation that directly affects those agencies. The rate of participation is unsurprisingly higher for legislation that actually gets enacted, and substantially lower for legislation that only indirectly affects those agencies. The picture for appropriations legislation is more mixed and varied by agency. Finally, it is important to note that these survey questions were not limited to when Congress requests technical assistance, but to all introduced, enacted, and appropriations legislation that directly or indirectly affects the respondent's agency. This is because, as the agency officials noted repeatedly in the interviews, it is not unusual for federal agencies to review and offer technical comments on legislation even without a request from Congress—especially on legislation that has a likelihood of being enacted.⁵⁸

⁵⁵ Shobe, *supra* note 15, at 27-28 & fig.8; *see also id.* at 23 & fig.5 (reporting that “[f]orty-eight respondents (89%) said that Congress often or always requires agency review, and only one respondent said rarely (2%) and none said never”). As noted in note 15, the fifty-four agency officials surveyed in 2014 worked across the administrative state, from fourteen executive departments and eleven independent agencies. *Id.* at 10-11.

⁵⁶ Q1(e).

⁵⁷ Only three in five respondents indicated that their agency provides technical assistance often (20%) or sometimes (40%) on appropriations legislation that *indirectly* affects the agency, with the remainder indicating never (10%) or rarely (30%). Q1(f).

⁵⁸ This is consistent with the findings from the Shobe study. *See* Shobe, *supra* note 15, at 24-25 & fig.6 (noting that “[t]wenty-eight respondents (52%) said that their agency always or often reviews legislation without a request from Congress and another nineteen (24%) said they sometimes do”).

3. *Factors that Affect Whether Agency Provides Technical Assistance*

During the interviews conducted for the Report, the agency officials uniformly indicated that their agency responds to just about every congressional request for technical drafting assistance that their agency receives—regardless of the political party affiliation of the requesting Member, the effect the legislation would have on the agency, the likelihood of such legislation actually being enacted, or any other factor. In the follow-up survey, we asked eight questions to explore these responses further, and, as discussed below, the agency respondents’ anonymous responses generally support their interview responses.

Before turning to these survey responses, it is worth exploring why federal agencies seem so willing to provide technical drafting assistance in response to *any* congressional request. To someone outside of the legislative process, this phenomenon may come as a surprise. After all, federal agencies are not required to provide such assistance to Congress. There is no constitutional or statutory mandate to do so, and the President has similarly not attempted to impose such a requirement.⁵⁹ When asked why their agency is so willing to provide technical drafting assistance, the agency officials provided a number of rationales.

First and foremost, the agency officials acknowledged that it is critical that their agency maintain a healthy and productive working relationship with Congress. Congress is the source of the agency’s statutory mandate and, even short of legislative action, has a number of tools to oversee and affect the agency’s day-to-day operations. Providing technical drafting assistance, especially when it is not actually required of the agency, strengthens that relationship. In so doing, the agency builds up institutional capital to use later to advance the agency’s priorities or to help ease the pressure of congressional oversight. One agency official stated, for instance, that “oversight is always in the back of our minds” when we are providing technical drafting assistance. Indeed, another remarked that his agency feels particularly pressed to complete all technical drafting assistance requests before a senior agency official is scheduled to appear at a congressional hearing.

Second, most of the agency officials underscored that providing technical drafting assistance is critical to ensure that the proposed legislation does not unnecessarily disrupt the existing statutory (and regulatory) scheme. In other words, agencies provide technical drafting assistance on proposed legislation that will affect them to ensure that the legislation is technically correct—even if they do not necessarily agree with all of the proposed legislation’s substance. As one of the agency respondents in the Shobe study remarked, “Sometimes there are bills we don’t like, but we still try to make it the best we can. When we give technical assistance we are trying to help the drafter make the bill the best we can even if we don’t like it. If it ultimately passes it is better that we have input than not.”⁶⁰ Similar comments were made by the agency officials interviewed for this Report.

⁵⁹ As discussed in Part I.A, the President does require federal agencies to provide feedback to OMB on certain legislative proposals and enacted bills, but such requirements do not extend to providing drafting assistance to Congress.

⁶⁰ Shobe, *supra* note 15, at 24.

Third, even if the proposed legislation is unlikely to be enacted, providing technical drafting assistance helps educate the congressional staffers about the agency's existing statutory and regulatory framework. A number of agency officials interviewed noted that Congress often introduces legislation that just duplicates existing law, and providing technical assistance helps Congress understand that the agency already has the authority to address those issues (and may already be addressing them). To capture this rationale, a number of agency officials referred to the technical assistance process as maintaining a "dialogue" between Congress and the agency. Although not mentioned by the officials interviewed for the Report, one agency respondent in the Shobe study expressed a related rationale of assisting the agency to understand how to implement the legislation: "Even if we don't like a bill, we spend a lot of time reviewing and providing substantive comments so that even though we don't like it, we will at least know what to do and how to implement it."⁶¹

Finally, one agency official interviewed for the Report indicated that the agency provides technical drafting assistance because it serves as "a very good source of intelligence." Put differently, by responding to technical drafting requests from all Members of Congress and thus encouraging congressional staffers to submit such requests on any legislation they are contemplating, the agency is better able to anticipate, monitor, and respond to any potential legislative proposals that may affect the agency.

To better understand which factors may affect whether an agency decides to provide technical drafting assistance in response to a congressional request, we asked the agency respondents how often eight factors affect whether their agency grants such request. Figure 2 depicts the responses to those questions, reporting the average frequency for how often a particular factor affects whether their agency decides to provide technical assistance requested by Congress.⁶² As Figure 2 depicts, the agency officials' anonymous survey responses are generally consistent with their comments during the interviews: their agency almost always decides to provide technical drafting assistance when Congress so requests regardless of the circumstances. No factor averaged more than a "sometimes" matters response, and only "sometimes" if rounded up.

For example, four in five agency respondents indicated that it never (20%) or rarely (60%) matters if the proposed legislation is likely to be enacted, with the remainder indicating either sometimes (10%) or often (10%)—for a composite score of 2.1 (2.0 = rarely; 3.0=sometimes).⁶³ Factors such as whether the whether Congress has provided a reasonable deadline (2.7), the agency has sufficient resources (2.5), or the technical assistance request is for comments on a draft bill (as opposed to asking the agency to draft the bill) (2.5) also do not seem to matter much, at least not with respect to whether the agency will provide assistance.⁶⁴ As one agency respondent noted in the

⁶¹ *Id.*

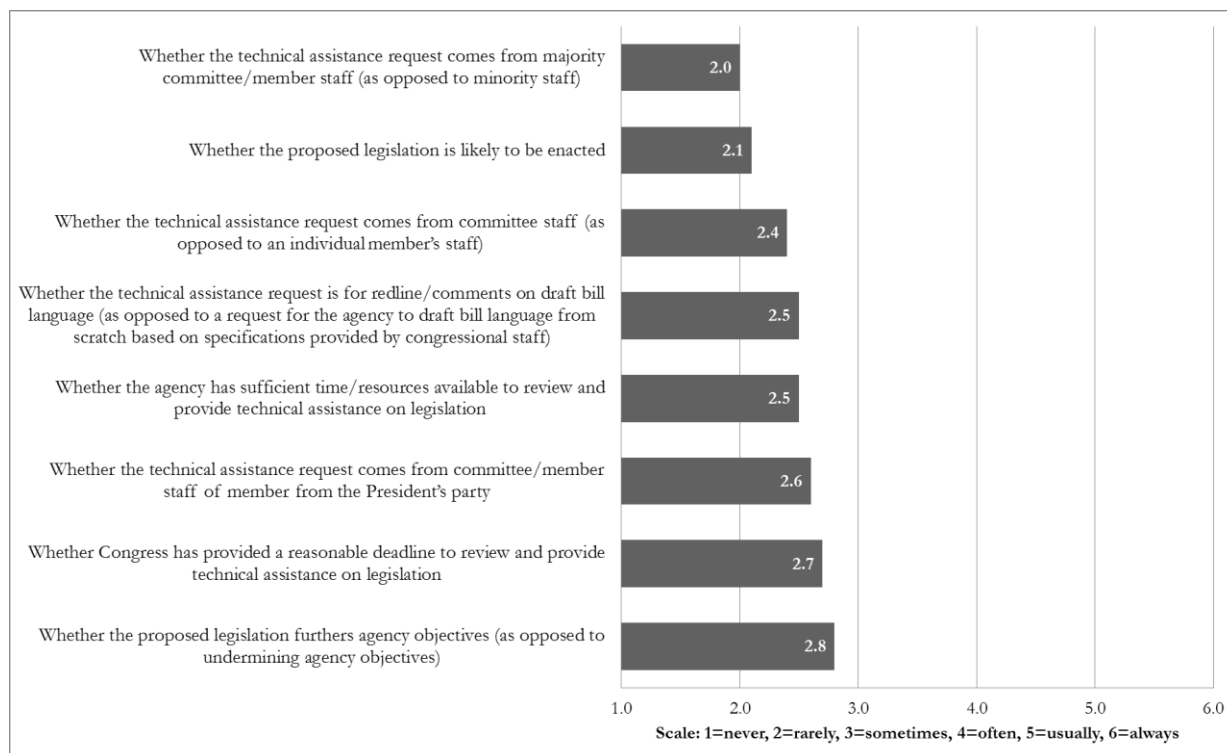
⁶² Q2(a)-(h).

⁶³ Q2(a).

⁶⁴ Q2(b), (c), (d).

comments, “The goal is to always be responsive to requests from the Hill for technical drafting assistance; however, an analysis of whether a particular piece of legislation is moving could influence the amount of time and effort spent on a request.”⁶⁵

Figure 2: Factors that Affect May Whether the Agency Decides to Provide Technical Assistance Requested by Congress (average frequency)



What about the identity or politics of the congressional requester? Again, those factors do not seem to matter too much. The least influential factor on the list is whether the request comes from a Member of the majority or minority party in Congress, with four in five agency respondents reporting that the majority/minority identity never (30%) or rarely (50%) matters; the remainder indicated sometimes (10%) or often (10%), for a composite score of 2.0 (2.0 = rarely).⁶⁶ Presidential politics seem to matter a bit more—at least for some agencies—with one in five (20%) agency respondents indicating that it usually matters whether the technical assistance request comes from a Member from the President’s party. But three in five respondents disagreed, indicating such party affiliation never (30%) or rarely (30%) matters, with the remainder indicating sometimes (10%) or often (10%).⁶⁷

⁶⁵ Q1 cmt.2.

⁶⁶ Q2(g).

⁶⁷ Q2(h).

One respondent underscored in the comments that “[t]his may vary from administration to administration. In some administrations, all (or almost all) requests are honored; in others, the Department is more responsive to majority, or to the President’s party.”⁶⁸ Moreover, it is important to underscore that these questions concern whether to grant the technical drafting assistance request, not how much time and resources the agency dedicates to the response (or how it otherwise responds). As one agency respondent remarked, “The agency always responds to technical comments requests; we may put more or less time or resources into requests that come from, for example, our authorizing committees versus another, more tangentially-related committee.”⁶⁹ The Shobe study explored this important distinction further, finding:

[M]any respondents reported different interactions with congressional staff from a party different from that of the President. Twenty-eight respondents (52%) said their interactions are often or always different and another fourteen respondents (26%) said their interactions are sometimes different. This is despite the fact that many respondents said that they try to offer assistance to both parties.⁷⁰

Similarly, despite agency officials noting during interviews that it is much more common for the technical assistance requests to come from committee staffers than staffers for individual Members, that distinction does not appear to matter when deciding whether to provide technical drafting assistance: three in five respondents indicated that this factor never (20%) or rarely (40%) matters, with the remainder indicating sometimes (20%) or often (20%)—for a composite score of 2.4 (2.0 = rarely; 3.0 = sometimes).⁷¹

Finally, the factor among the eight surveyed that seems to matter the most—albeit with still an average response (2.8) of just under sometimes mattering—is whether the proposed legislation furthers agency objectives (as opposed to undermining agency objectives): half of the respondents indicated that this usually (20%), often (10%), or sometimes (20%) matters, with the other half indicating never (20%) or seldom (30%).⁷² One agency respondent in the Shobe study may be reflective of those who indicated that this factor at least sometimes matters:

We usually will help out Congress any time they request technical assistance. However, if our department hates a bill, we don’t want to fix it for them because from our perspective it can’t be fixed. If we strongly oppose the bill we are not going to help them make technical changes to make it better.⁷³

⁶⁸ Q2 cmt.2.

⁶⁹ Q2 cmt.3.

⁷⁰ Shobe, *supra* note 15, at 45; *see also id.* at 45 fig.11.

⁷¹ Q2(f).

⁷² Q2(e).

⁷³ Shobe, *supra* note 15, at 24.

Again, it is worth emphasizing that these questions focus on factors that affect whether the agency decides to provide any technical drafting assistance at all. The factors could still affect how much time, resources, and detail are provided for a particular request. One agency respondent's comment in response to the survey nicely summarizes the majority view shared during the agency interviews conducted prior to the survey:

We strive to accommodate all requests and do so “blind” to the chamber, to the majority or minority status of the requesting party, to the nature of the request (i.e., from committee staff or Member staff), or the likelihood of action. Those elements, however, may affect the priority placed on the assistance provided. If anything, scope and timing dictate the amount of assistance provided. Rarely, do we refuse to provide assistance, and only if there is good cause to do so (e.g., the request goes to legislation that is repugnant to public policy or the interests of the United States).⁷⁴

4. Agency Actors Involved in Providing Technical Drafting Assistance

As discussed in Part II.B.1, congressional requests for technical drafting assistance generally arrive first at the agency's legislative affairs office, though some informal requests are sent to agency experts directly based on prior relationships between the agency and congressional personnel. Part II.C details the various agency organizational models, but this Part explores the related question about which agency actors are involved in the agency's response to a congressional request for technical assistance.

During the interviews, the general response was that the agency involves those within the agency with expertise in the substantive matter in addition to those with expertise in legislative drafting. In other words, while the legislative affairs staff may be the congressional liaison (and gatekeeper), the program and policy experts and the agency's legislative counsel are quickly involved in reviewing the proposed legislation and providing comments. For some agencies, the regulatory counsel were also involved, and the agency officials interviewed generally indicated that OMB was generally not involved in purely technical assistance and that private parties (regulated entities or other outside organizations) were rarely involved in developing the agency's response.

To further explore this topic, the anonymous follow-up survey asked the participating agencies six questions about how often a variety of actors are involved in the agency's response to a congressional request for technical assistance. Figure 3 presents the responses to those survey questions, which are generally consistent with the responses given during the agency interviews.⁷⁵ As Figure 3 illustrates, all of the agency respondents indicated that the legislative/congressional affairs staff are often (10%), usually (50%), or always (40%) involved in the agency's response—for a composite score of 5.3 (5.0 = usually; 6.0 = always).⁷⁶ Nine in ten respondents similarly indicated

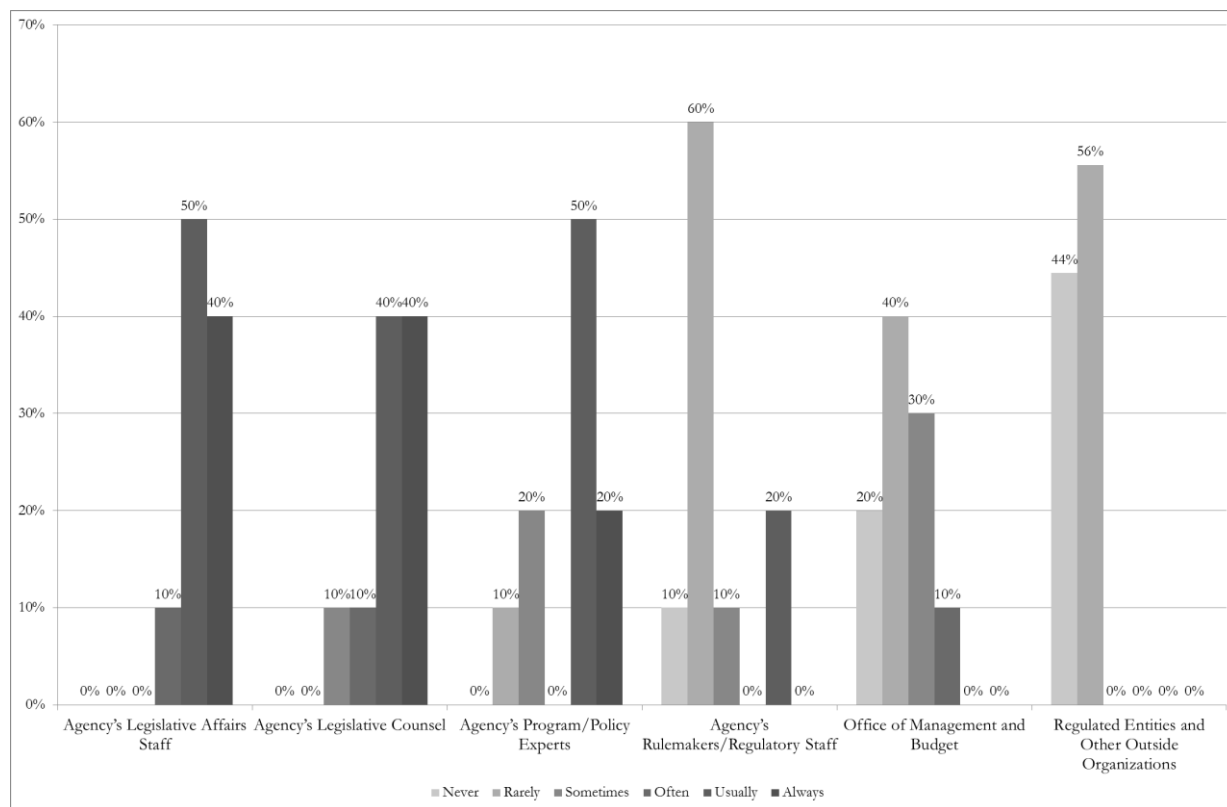
⁷⁴ Q2 cmt.1.

⁷⁵ Q3(a)-(f).

⁷⁶ Q3(a).

that agency legislative counsel—for example, attorneys in the agency’s chief or general counsel office—are always (40%), usually (40%), or often (10%) involved in agency’s technical assistance response, with the remainder (10%) indicating sometimes—for a composite score of 5.1.⁷⁷

Figure 3. Frequency of Involvement of Various Actors in Agency’s Response to Congressional Request for Technical Drafting Assistance



With respect to agency officials outside of the legislative affairs and legislative counsel staffs, the results are a bit more mixed. Seven in ten agency respondents indicated that agency program/policy experts always (20%) or usually (50%) participate, with the remainder indicating sometimes (20%) or rarely (10%)—for a composite score of 4.5 (4.0 = often; 5.0 = usually).⁷⁸ This is consistent with the Shobe study, in which about nine in ten (89%) agency officials surveyed indicated that they “always notify affected parties within their agency of potential legislation.”⁷⁹ As one agency respondent in the Shobe study observed, “We are the technical drafters, but the program clients drive the policy. They are the ones carrying out the policy so they know it much better than we do.”⁸⁰

⁷⁷ Q3(b).

⁷⁸ Q3(c).

⁷⁹ Shobe, *supra* note 15, at 28.

⁸⁰ *Id.* at 29-30.

However, with respect to the agency’s rulemakers/regulatory staff, seven in ten respondents indicated that they are rarely (60%) or never (10%) involved, with 10% indicating sometimes and the remainder (20%) indicating usually—for a composite score of 2.6 (2.0 = rarely; 3.0 = sometimes).⁸¹ This is somewhat surprising. At both the Department of Energy and the Department of Housing and Urban Development, for instance, the legislative and regulatory counsel are housed in the same division within the agency general counsel’s office and cross-train in both legislative and regulatory drafting. One agency respondent commented along these lines: “Legislation/regulatory attorneys are in the same office at our agency, so regulatory staff have the same input as the agency’s legislative counsel, as appropriate for a given request.”⁸² At most other agencies these lawyers are not housed in the same division and apparently do not interact nearly as much, at least with respect to legislative drafting.⁸³ One respondent noted in the comments that “[o]ur answer (never) pertains to staff who are dedicated regulation writers. Other program staff are often involved in developing regulations and in the regulatory process; they participate more frequent[ly] in developing technical assistance than [d]o dedicated regulation writers.”⁸⁴

Finally, involvement of actors outside of the agency in the agency’s response to a congressional request for technical assistance is markedly lower. Consistent with the agency interviews, all of the agency survey respondents indicated that regulated entities and other outside organizations are rarely (56%) or never (44%) involved in the agency’s technical drafting assistance response—for a composite score of 1.6 (1.0 = never; 2.0 = rarely).⁸⁵ With respect to the “rarely” responses, one agency official interviewed remarked that “private parties go to Congress first, and then come to the agency’s legislative counsel and substantive staff” to lobby for particular drafting changes. Even

⁸¹ Q3(d).

⁸² Q3 cmt.3.

⁸³ These responses, however, are consistent with those from the Author’s empirical study of agency rule drafters, who similarly reported less personal involvement in legislative drafting. *See* Walker, *supra* note 7, at 1037 & fig.6. Moreover, as noted in the prior study, *see id.* at 1047-48, this disconnect between the agency’s legislative drafters and its regulatory drafters casts some doubt on the scholarly calls, *see* note *supra* 14 (citing literature), for a more purposivist approach to agency statutory interpretation based in part on the agency’s involvement in drafting the legislation that it is now interpreting. This disconnect may similarly cast some doubt on one of the rationales for judicial deference to agency statutory interpretations. *See* CHRISTOPHER EDLEY, ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 145 (1992) (nothing that a “common argument in favor of deference to agency interpretation of statutes is that agency officials are more knowledgeable of the legislative intent since they were direct or indirect participants in the legislative process,” but pointing out that such argument “can be met by exploiting empirical insufficiencies” about actual agency involvement in the legislative process).

⁸⁴ Q3 cmt.2. This comment may explain the apparent discrepancy between the agency officials surveyed here and those surveyed in the Shobe study—nearly 90% of the latter indicated that “people within agencies who are tasked with day-to-day implementation and administration of agency statutes are also involved in the [drafting assistance] review process.” Shobe, *supra* note 15, at 28 & fig.9.

⁸⁵ Q3(f). At least one agency respondent must have misunderstood the question, noting in the comments that, “[a]s a rule, we do NOT provide drafting assistance to any entity beyond the U.S. Government.” Q3 cmt.1. Another agency chose not to respond to this subquestion, likely an independent agency that is not bound by the OMB Circular A-19 process.

then, however, the agency seldom lets the private party play a role in the agency's actual response to Congress.

Similarly, three in five agency respondents reported that OMB is rarely (40%) or never (20%) involved, with the remainder indicating sometimes (30%) or often (10%).⁸⁶ This results in a 2.3 composite score (2.0 = rarely; 3.0 = sometimes), which is similar to the reported involvement of their agency's rulemakers/regulatory staff (at 2.6). It should be noted, however, that during the interviews agency officials often mentioned that they sometimes coordinated technical drafting assistance with other agencies that would be affected by the proposed legislation. This interagency coordination may explain some of the "sometimes" or "often" responses about OMB's involvement. The survey did not ask about interagency coordination in providing technical drafting assistance—a topic that merits further examination especially in light of the rise of multiagency regulatory and enforcement responsibilities.⁸⁷

5. *Format of Agency Response to Technical Assistance Request*

As discussed in Part I.B, Circular A-19 does not require OMB preclearance of agency technical drafting assistance responses "provided that they state in their transmittal letters that the drafting service does not constitute a commitment with respect to the position of the Administration or the agency."⁸⁸ Circular A-19 does, however, instruct agencies to advise OMB upon receipt of any such congressional requests, to forward the requests if they are in writing, and send OMB any agency response "at the time of transmittal, together with an explanatory statement of what the bill would accomplish if that is not contained in the transmittal letter."⁸⁹ During the interviews, a number of agency officials indicated that their agency does not follow these OMB notice and transmittal instructions, and several indicated that OMB has not attempted to enforce these requirements. Circular A-19, after all, has not been updated since the Carter Administration in 1979, so perhaps some of the guidelines no longer apply in practice.

Another recurring theme that emerged during the agency interviews is that the process of providing technical assistance is highly informal and that a lot of it takes place by phone instead of in writing. One agency official's comment during an interview is reflective of at least a half dozen other agency officials who remarked on the form of the technical assistance: "Try to avoid redlining and avoid email. . . . Sometimes we draft up talking points or comments, but almost always try to find a

⁸⁶ Q3(e).

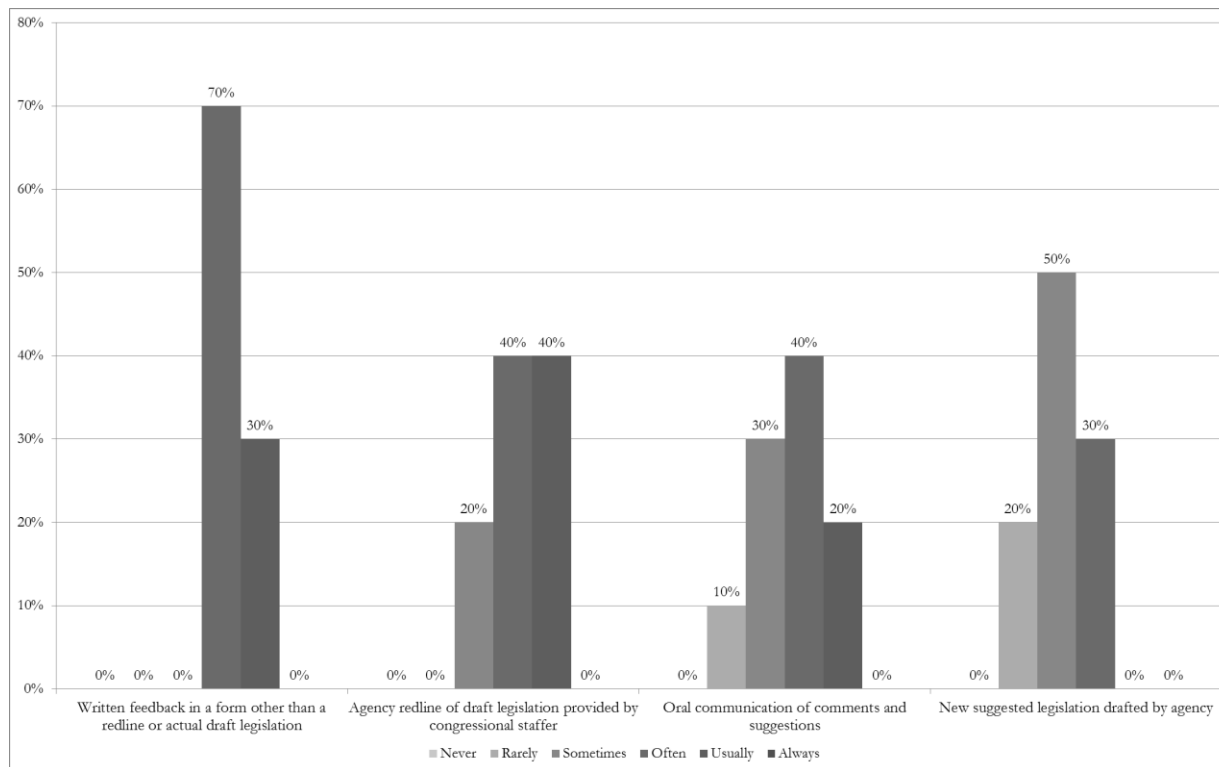
⁸⁷ See, e.g., Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012); Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201; Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181 (2011).

⁸⁸ OMB CIRCULAR A-19, *supra* note 17, § 7(i).

⁸⁹ *Id.*

way to just pick up the phone.” The anonymous follow-up survey explored these issues further in four questions, the results of which are depicted in Figure 4.⁹⁰

Figure 4. Format of Technical Drafting Assistance Provided by Federal Agencies



As Figure 4 illustrates, the survey responses do not support this perceived systemic practice that agencies try to provide feedback orally in lieu of formalizing it in writing. To the contrary, written feedback appears to be the predominant format. For instance, all respondents indicated that their agency usually (30%) or often (70%) provides “[w]ritten feedback in a form other than a redline or actual draft legislation (for example, email or memo summarizing technical feedback)”—for a composite score of 4.3 (5.0 = usually; 4.0 = often).⁹¹ Similarly, four in five respondents indicated that their agency usually (40%) or often (40%) transmits an “[a]gency redline of draft legislation provided by congressional staffer,” with the remainder (20%) indicating sometimes—for a composite score of 4.2.⁹²

Respondents reported slightly lower use of “[o]ral communication of comments and suggestions”: three in five respondents indicated that their agency usually (20%) or often (40%) communicates their technical drafting assistance orally, with the remainder indicating sometimes

⁹⁰ Q4(a)-(d).

⁹¹ Q4(d).

⁹² Q4(b).

(30%) or rarely (10%)—for a composite score of 3.7 (3.0 = sometimes; 4.0 = often).⁹³ To be sure, these options are not mutually exclusive. The agency officials indicated during the interviews and recognized in their survey responses that there is often overlap between oral and written feedback. But the idea that agencies try to avoid providing written technical feedback seems misplaced—or at least overstated—based on the survey responses.

Finally, the agency respondents surveyed seem to reinforce the agency officials interviewed in stating that it is less common for their agency to draft new legislation in response to a technical drafting request. Half (50%) of the respondents indicated that their agency sometimes provides “[n]ew suggested legislation drafted by agency,” with the remainder indicating often (30%) or rarely (20%)—for a composite score of 3.1.⁹⁴ Of those who indicated often, one respondent commented that “[t]echnical assistance sometimes (or even often) *includes* new legislative language suggested by the Department, but it rarely (if ever) includes a new suggested text of the entire bill.”⁹⁵

The lack of new suggested legislation is likely due in part to the fact that congressional staffers seldom request agencies to draft legislation from scratch—the lack of which a number of agency officials interviewed lamented. One agency official, for instance, remarked: “Congress sends more draft bills than objective memos [that provide specifications for the agency to draft the legislation]. It would be easier if Congress set forth objectives and let [the agency legislative counsel] draft it.” This was not the majority view, however, among the agency officials interviewed. Most seemed to prefer to provide technical comments on legislation that someone in Congress had drafted rather than to draft new legislation for the congressional requester.

6. *Factors that Affect Whether Congress Adopts Agency Technical Assistance*

The agency interviews focused on the technical drafting assistance process from the congressional request through the agency response. The anonymous follow-up survey went one step further and asked eight questions concerning “how often [certain] factors seem to affect whether Congress adopts the technical assistance provided by [the respondent’s] agency.” The responses to those questions are presented in Figure 5.⁹⁶ The questions build on findings from the Shobe study, where the agency officials surveyed “overwhelmingly reported that Congress accepts technical comments” with nearly all (96%) respondents reporting that Congress does so always or often.⁹⁷

As depicted in Figure 5 and similar to the responses about factors that affect whether the agency decides to provide the requested technical assistance (in Figure 2), the identity and politics of the congressional requester do not seem to matter too much, whereas other noteworthy factors do seem

⁹³ Q4(a).

⁹⁴ Q4(c).

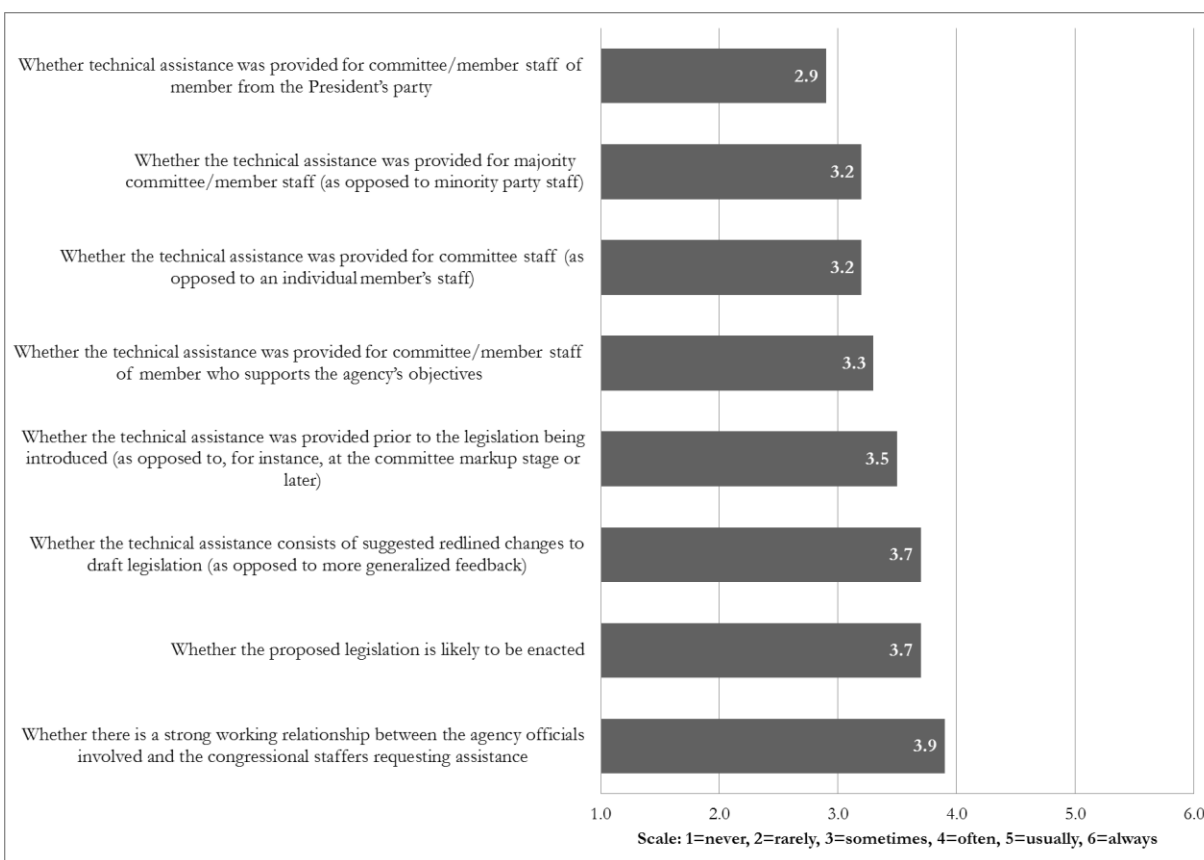
⁹⁵ Q4 cmt.1.

⁹⁶ Q5(a)-(h).

⁹⁷ Shobe, *supra* note 15, at 27 & fig.7.

to matter. The factors that the respondents indicated mattered least are whether the congressional requester was from the President’s party (2.9), whether the requester was a committee staffer or staffer for an individual Member of Congress (3.2), and whether the requester was a staffer from the majority or minority party in Congress (3.2).⁹⁸ It seems to matter a little bit more—again, at least from the perspective of the agency respondents—“[w]hether the technical assistance was provided for committee/member staff of member who supports the agency’s objectives” (3.3).⁹⁹ For each of these four factors, however, one in five (20%) agency respondents indicated that it rarely seems to matter. And with the exception of the last factor of supporting the agency’s objectives (at 60%), at least seven in ten respondents indicated that the other three factors at most only sometimes matter.

Figure 5. Factors that Affect Whether Congress Adopts the Technical Assistance Provided by the Agency (average frequency)



So what do agencies believe seems to affect whether Congress adopts the technical assistance their agency provides? At what stage of the legislative process the technical assistance is provided seems to matter. Three in five (60%) agency respondents indicated that it appears to often matter whether it was offered “prior to the legislation being introduced (as opposed to, for instance, at the

⁹⁸ Q5(e)-(g).

⁹⁹ Q5(h).

committee markup stage or later).” Another three in ten (30%) indicated that sometimes matters with the remainder (10%) indicating rarely—for a composite score of 3.5 (3.0 = sometimes; 4.0 = often).¹⁰⁰ This is consistent with the Shobe study, where a few respondents reported that the timing of the agency’s comments mattered, with one respondent in particular stating: “After the markup it gets to the really late stages of the process if we want to raise an issue we really have to push hard because no one wants us to be bringing up issues. You have to convince them to make changes at that point.”¹⁰¹ It similarly seems to matter whether the proposed legislation is likely to be enacted. Three in five agency respondents reported that it seems to always (10%) or often (50%) matter, and another three in ten (30%) indicated it sometimes matters with the remainder (10%) indicating rarely—for a composite score of 3.7.¹⁰²

Echoing the themes that emerged during the agency interviews, relationships matter. Indeed, of the eight factors included in the survey, relationship received the highest composite score of 3.9 (4.0 = often). Three in five respondents indicated that it usually (30%) or often (30%) seems to matter “[w]hether there is a strong working relationship between the agency officials involved and the congressional staffers requesting assistance,” with the remainder (40%) indicating sometimes.¹⁰³ Another factor reported on average as seeming to matter a lot to Congress is, somewhat surprisingly, the format of the technical assistance: “[w]hether the technical assistance consists of suggested redlined changes to draft legislation (as opposed to more generalized feedback).” Three in five respondents indicated that the format usually (10%) or often (60%) matters, with the remainder indicating sometimes (20%) or rarely (10%)—for a composite score of 3.7.

These questions only scratch the surface of this important inquiry, and the findings are necessarily quite limited. For instance, as one agency respondent observed, “We don’t always know whether our comments are accepted—if, for example, the legislation doesn’t go anywhere, we might not know whether they took our suggestions.”¹⁰⁴ Much more work needs to be done to understand what affects whether Congress adopts the technical assistance federal agencies provide, including more exploration into the views of the congressional staffers and Members who review and consider the technical comments provided by the agencies.

C. Agency Organizational Models for Providing Technical Assistance

While Part II.B sets forth the findings with respect to the general process for—and agency-specific variation to—providing technical drafting assistance, this Part turns to cataloguing the various agencies’ organizational models in place to provide such assistance. Each agency profiled in the Report has a distinct organizational model for providing technical drafting assistance, and those

¹⁰⁰ Q5(c).

¹⁰¹ Shobe, *supra* note 15, at 26 n.89.

¹⁰² Q5(a).

¹⁰³ Q5(b).

¹⁰⁴ Q5 cmt.1.

differences are explored in detail in the agency-specific overviews in Appendices B-K. Despite these important and vast differences among agencies, however, three general models emerge from the ten agencies profiled in this Report: a centralized legislative counsel model; a decentralized agency experts model; and a centralized legislative affairs model. Each will be addressed in turn.

1. Centralized Legislative Counsel Model

The predominant model among the agencies profiled in the Report is one where the legislative counsel within the agency's office of general counsel is the primary drafter and coordinator of all technical assistance responses.¹⁰⁵ To be sure, the legislative affairs office remains the official liaison and communicator to Congress and generally the first agency contact for a technical drafting assistance request. But once the request is received, the legislative affairs staff turns over the drafting coordination to the agency's legislative counsel. The legislative counsel reaches out to the agency's policy and program experts and other officials where appropriate. The legislative counsel keeps the pen on the mark-up and comments. When the technical assistance request is complete, the legislative counsel sends it back to the legislative affairs staff to officially communicate back to the congressional requester. At times, however, informal communications have already taken place between the legislative counsel (and other agency experts that have been involved in the process) before the legislative affairs staff receives the technical assistance response. Other times, the legislative affairs staff facilitates the teleconference or in-person meeting between the congressional requester and the relevant agency personnel, including the legislative counsel.

This model has several advantages that are particularly relevant to executive agencies. First, legislative counsel often have more expertise in legislative drafting than legislative affairs staffers, as all legislative counsel have law degrees and training in statutory interpretation, whereas that is not always true with legislative affairs staffers. At many agencies, there also tends to be less turnover—and thus more institutional knowledge retained—among legislative counsel. But perhaps more importantly, legislative counsel are career civil servants, whereas legislative affairs staffers often are political appointees (or at least the office heads and deputies are political appointees). During the interviews many agencies officials emphasized the important career-political division between legislative counsel and legislative affairs for maintaining the agency's status with Congress as an expert, non-partisan provider of technical drafting assistance. For instance, the HHS officials—among others—listed this as one of the agency's best practices: “Having [legislative affairs] deal directly with Congress—and the politics that may be implicated when dealing with Congress—allows the OGC Legislation Division (and the rest of the Department) to maintain its role as an expert, nonpolitical counselor on legislative drafting.”

¹⁰⁵ This model, with some substantial variations, has been adopted by the Departments of Agriculture, Education, Energy, Homeland Security, Housing and Urban Development, and Labor.

2. Decentralized Agency Experts Model

One agency profiled in the Report—the Department of Commerce—has adopted a more decentralized agency experts model. This model also seems to have been adopted at (at least) the Department of Treasury and to some extent the Federal Communications Commission, though neither agency is profiled in the Report. Under this model, the legislative affairs office serves as the gatekeeper and official congressional liaison, but instead of sending technical drafting assistance requests to a centralized legislative counsel division, the requests are typically handled by the bureau-level policy and program experts (and attorneys, where applicable). The agency general counsel's office only gets involved with cross-agency legislation or where otherwise determined helpful or necessary.

This decentralized model perhaps better leverages the bureau-level agency experts and gets the requests before the agency officials best situated to substantively and technically review the proposed legislation. But it may do so at the cost of not involving lawyers who have specialized in legislative drafting and who may be more aware of common drafting problems and cross-cutting agency issues. Under this model, moreover, the legislative affairs staff may have to play a more involved role in developing the agency's response, which could frustrate the political-career division in executive agencies discussed in Part II.C.1.

3. Centralized Legislative Affairs Model

The final model centralizes the technical drafting assistance process within the legislative affairs office, as opposed to within the legislative counsel's office. Unsurprisingly, this model has developed at independent agencies—among the agencies profiled in the Report, the Federal Reserve System—where the legislative affairs staff consists of career civil servants, not political appointees. In this model, the legislative affairs staff coordinates the process with the agency's program and policy experts and relies on the agency general counsel's office when appropriate.

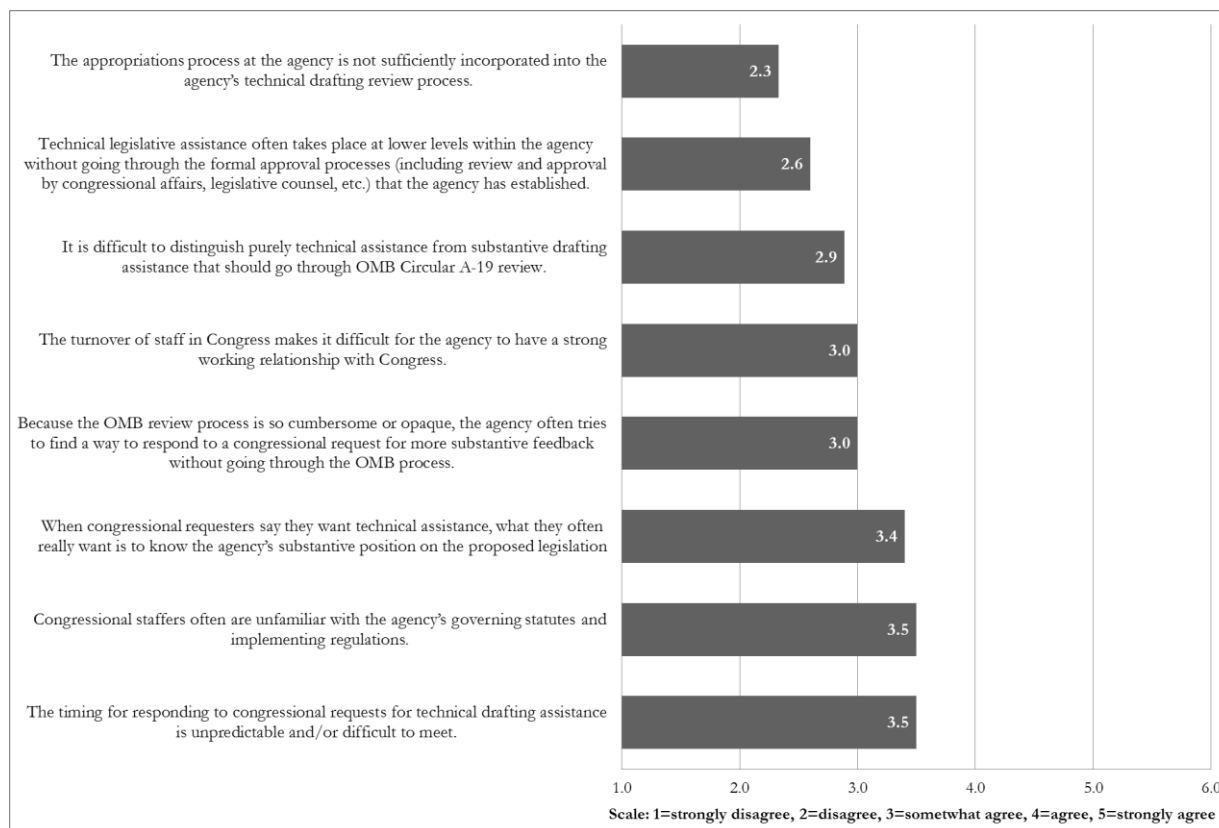
The Pension Benefit Guaranty Corporation has a variant of this model. There, the agency general counsel's office is the primary coordinator for technical drafting responses. The majority of technical requests from Congress, however, deal with requests for economic modeling for proposed legislation and not request for legislative language review. Those requests are handled by the legislative affairs staff (there, the Office of Policy and External Affairs).

D. Common Challenges in Providing Technical Assistance

A substantial portion of the agency interviews focused on the challenges in their agency's current process of providing technical drafting assistance. Agency officials identified a number of challenges, but eight obstacles seemed to emerge as common themes. The anonymous follow-up survey asked the agency respondents whether they agreed that these are indeed challenges, and the responses are

reported (by composite score) in Figure 6.¹⁰⁶ These challenges can be grouped in three categories, each discussed in turn: intra-agency challenges; congressional challenges; and the technical-substantive drafting assistance dilemma.

Figure 6. Perceived Obstacles in the Current Process for Providing Technical Drafting Assistance (average agreement)



1. Intra-Agency Challenges

During the agency interviews, two intra-agency challenges emerged as common themes. First, a number of agency officials noted the difficulty of providing technical assistance on appropriations legislation. As detailed in the agency-specific overviews included as Appendices B-K, appropriations legislation is generally not handled by the legislative affairs offices at federal agencies, but by the agency's financial or budget office. Yet, as discussed in Part I.C, Congress in recent years has increasingly inserted substantive provisions or "riders" in appropriations legislation—requiring more technical drafting review from the agency. Because agency processes for reviewing authorization and appropriations legislation have historically been channeled through different parts of the agency,

¹⁰⁶ Q6(a)-(h). Composite scores for these questions are calculated somewhat differently from the rest of the questions in the survey by giving 5 points for "strongly agree," 4 points for "agree," 3 points for "somewhat agree," 2 points for "disagree," and 1 point for "strongly disagree." The aggregate is then divided by the total number of respondents for the question.

agencies have had to adapt to provide technical drafting assistance with respect to proposed appropriations legislation. Second, some agency officials also expressed concern that a fair amount of technical drafting assistance occurs informally at lower levels within the agency without involving the legislative counsel or legislative affairs personnel that should be included in the process.

Despite being mentioned as obstacles in the agency interviews, the agency respondents to the anonymous survey generally disagreed that these are actually problems. About two thirds (67%) disagreed that “[t]he appropriations process at the agency is not sufficiently incorporated into the agency’s technical drafting review process,” with the other third (33%) somewhat agreeing—for a composite score of 2.3 (2.0 = disagree; 3.0 = somewhat agree).¹⁰⁷ In revisiting the agency interviews in light of these survey responses, the most reasonable reconciliation seems to be that historically this authorization-appropriations division within the agency may have been a problem, but that perhaps the agencies have adequately evolved to address the issue. Indeed, as discussed in Part III and in the agency-specific overviews in Appendices B-K, agencies have taken a number of steps to make sure that substantive provisions in appropriations legislation receive technical review.

Likewise, two in five agency survey respondents disagreed (20%) or strongly disagreed (20%) that “[t]echnical legislative assistance often takes place at lower levels within the agency without going through the formal approval processes (including review and approval by congressional affairs, legislative counsel, etc.) that the agency has established.”¹⁰⁸ Another two in five (40%) only somewhat agreed, with the remainder (20%) agreeing (though no one strongly agreed)—for a composite score of 2.6 (2.0 = disagree; 3.0 = somewhat agree). This survey finding is harder to square with the agency interviews, and the survey respondents offered no comments to clarify their disagreement with this perceived problem. One explanation could be that, although this phenomenon may take place, it is not truly a problem for the agency—perhaps because only less significant technical assistance occurs through this informal, lower-level process. Another perhaps more likely explanation is that the wording of the question—in particular, the inclusion of the term “often”—may have affected the responses.

In all events, based on the survey responses, these intra-agency challenges may not be as serious as suggested during the agency interviews. Indeed, of the eight challenges included in the survey, they are the ones with which the agency respondents disagreed most.

2. *Congressional Challenges*

The challenges presented by Congress, however, were more consistently reported as obstacles across the agency interviews and the anonymous follow-up survey. The survey assessed three

¹⁰⁷ Q6(e). One of the agencies did not respond to this question, presumably an agency that is not subject to the appropriations process.

¹⁰⁸ Q6(f).

different challenges that Congress presents (actually four, but the fourth will be discussed in Part II.C.3).

First, a frequent complaint during the agency interviews was that the congressional staffers are unfamiliar with the agency's governing statutes and implementing regulations and often propose legislation that would duplicate existing law or inadvertently disrupt the current statutory and regulatory scheme. Oftentimes this complaint was stated in tandem with a lament about the turnover among congressional staffers, discussed below. The survey respondents generally agreed that this lack of statutory awareness in Congress is a challenge. Half of the respondents agreed (40%) or strongly agreed (10%) with another two in five (40%) somewhat agreeing that "[c]ongressional staffers often are unfamiliar with the agency's governing statutes and implementing regulations"—tied for the highest composite score of 3.5 (3.0 = somewhat agree; 4.0 = agree).¹⁰⁹

Second, the agency officials interviewed repeatedly noted that the deadlines congressional requesters impose are unreasonable, unpredictable, or otherwise difficult to meet. Two agency officials in particular wished that Congress would try to time technical drafting assistance requests to coincide with the congressional recesses. Another two referred to many congressional requests as "fire drills" because the deadlines are unreasonably tight yet often not real. Many, however, recognized that there is little that can be done, as the tight deadlines are inherent in the legislative process. Again, the agency survey respondents generally agreed that congressional deadlines are a problem: Half agreed (40%) or strongly agreed (10%), another two in five somewhat agreed (40%), and the remainder disagreed (10%) that "[t]he timing for responding to congressional requests for technical drafting assistance is unpredictable and/or difficult to meet"—tied for the highest composite score of 3.5.¹¹⁰

Finally, a fair number of agency officials interviewed bemoaned the turnover in congressional staff—as to both the institutional memory on the Hill and the congressional-agency working relationship. Turnover among congressional staffers is not necessarily a new phenomenon and has been well documented elsewhere.¹¹¹ The agency officials surveyed somewhat agreed that this is a problem: Three in ten (30%) agreed and another two in five (40%) somewhat agreed, with the remainder (30%) disagreeing that "[t]he turnover of staff in Congress makes it difficult for the agency to have a strong working relationship with Congress."¹¹²

¹⁰⁹ Q6(g). The remainder (10%) disagreed, with no one disagreeing strongly.

¹¹⁰ Q6(f).

¹¹¹ See, e.g., Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807, 846 (2014) ("For example, all except for two House committees had staff retention rates below 60% in the period between 2009 and 2011, a period in which control of the House passed from Democrats to Republicans.").

¹¹² Q6(h).

3. *The Technical-Substantive Drafting Assistance Dilemma*

As discussed in Part I.A, Circular A-19 requires OMB preclearance for any agency substantive legislative activity, which for shorthand can be understood to include any agency substantive or policy position on proposed legislation in addition to any agency-initiated substantive legislation. Purely technical drafting assistance, by contrast, does not require OMB preclearance. Despite that this Report does not focus on the OMB Circular A-19 process, nor intend to explore the role of federal agencies in substantive legislative activities, all of the agency officials interviewed volunteered a number of comments—most of them critical or at least constructive—about the OMB Circular A-19 process.

These comments ranged from complaints about how slow and burdensome the OMB preclearance is, and how antiquated the current guidelines are (they have not been updated in over three decades), to how there is no clear standard to distinguish between technical and substantive legislative assistance, and how the notice and transmittal requirements for technical assistance are honored in the breach and/or should be formally abandoned. Many agency officials, however, also countered that Circular A-19 should not be revisited as the informal agency (and OMB) processes that have developed to function around the formal Circular A-19 processes work efficiently; formal modification by OMB would likely only disrupt an informal system that seems to be functioning quite well.

A number of these criticisms about the OMB process lie outside the scope of the Report, which focuses on the agency technical assistance in legislative drafting. A few of these perceived challenges, however, directly relate to technical drafting assistance. These challenges can be grouped around three main issues, which were further explored in the anonymous follow-up survey.¹¹³

First, a number of agency officials mentioned during the interviews that it is difficult to distinguish under OMB Circular A-19 between substantive legislative assistance that requires preclearance and purely technical legislative assistance that does not. As one agency official put it, “The technical-substantive distinction involves a lot of judgment; it’s a smell test.” When asked about this problem in the anonymous follow-up survey, the agency respondents somewhat agreed: Roughly two in five (44%) somewhat agreed that “[i]t is difficult to distinguish purely technical assistance from substantive drafting assistance that should go through OMB Circular A-19 review,” whereas the remainder split between disagreeing (33%) and agreeing (22%)—for a composite score of 2.9 (3.0 = somewhat agree).¹¹⁴

Second, during the interviews the agency officials suggested that because they perceive the OMB process as cumbersome and unclear, their agency often attempts to respond to a congressional

¹¹³ One of the agencies did not respond to two of these three questions—Q6(b), (c)—presumably one that is an independent agency and thus not subject to OMB Circular A-19.

¹¹⁴ Q6(b).

request for more substantive feedback without going through the OMB preclearance process. A remark made by an agency official interviewed for the Shobe study is similar to a number of comments made by agency officials interviewed for this Report: “The more policy oriented it gets the more levels of bureaucracy it has to be cleared through . . . If I want to provide policy input but don’t want to go through a bunch of layers of bureaucracy then I pick up the phone.”¹¹⁵

When asked whether “the agency often tries to find a way to respond to a congressional request for more substantive feedback without going through the OMB process,” nearly four in five agency respondents agreed (22%) or somewhat agreed (56%), with the remainder (22%) disagreeing—for a composite score of 3.0 (3.0 = somewhat agree).¹¹⁶ One agency respondent commented, though, that this practice is still consistent with Circular A-19:

We definitely agree that the OMB review process is in fact cumbersome or opaque. The answer above (somewhat agree) addresses the second part of the statement—whether we often try to find a way to respond without going through the process. However, our responses in such situations comply with Circular A-19.¹¹⁷

Finally, the most consistent comment during the interviews with respect to the technical-substantive dilemma is that—as we phrased it in the follow-up survey—”[w]hen congressional requesters say they want technical assistance, what they often really want is to know the agency’s substantive position on the proposed legislation.”¹¹⁸ Sometimes, the agency officials explained, the congressional staffer just wants to know if the proposed legislation would make good policy. Other times, as one official explained, “the [congressional] staffer wants to sell it to the Member and being able to say that the agency says it’s okay or has worked on it” helps sell the proposed legislation with the staffer’s boss. In those cases, the congressional staffers do not want a formal, official agency position—just the agency expert’s unofficial take on the proposed legislation. This puts the agency in a difficult position of either not providing the type of assistance the congressional requester desires or skirting the technical-substantive line set forth in Circular A-19.

When the agencies were asked about this problem in the anonymous follow-up survey, everyone agreed (40%) or somewhat agreed (60%) that “what congressional staffers often really want is to know the agency’s substantive position on the proposed legislation”—for a composite score of 3.4 (3.0 = somewhat agree; 4.0 = agree).¹¹⁹ Although the agency officials may be right that OMB Circular A-19 should not be revisited as the informal processes work just fine, these findings suggest that the technical-substantive drafting dilemma is a real one and at least merits further attention.

¹¹⁵ Shobe, *supra* note 15, at 33.

¹¹⁶ Q6(c).

¹¹⁷ Q6 cmt.1.

¹¹⁸ Q6(d).

¹¹⁹ Q6(d).

Such investigation should evaluate not only the views of the federal agencies, but also those of the congressional requesters and of the Legislative Reference Division staff at OMB.

III. PROPOSED RECOMMENDATIONS AND BEST PRACTICES

The best practices identified during the agency interviews and from the anonymous agency survey responses can be grouped into two (albeit overlapping) categories: intra-agency policies and practices to improve the technical drafting assistance process; and agency policies and practices to strengthen the agency's relationship and interaction with Congress in the legislative process. Each will be addressed in turn, framed as potential recommendations for consideration by ACUS. Additional best practices identified by the agencies are included at the end of each of the agency-specific overviews included as Appendices B-K to the Report.

A. Best Practices for Agency to Improve Technical Drafting Assistance

1. *Consider Memorializing Guidance on Agency's Role in the Legislative Process*

Intra-agency coordination in providing technical drafting assistance is critical and, especially at the larger departments, sometimes challenging. At least two of the agencies profiled in the Report—the Departments of Homeland Security and Labor—have issued formal agency directives on how the agency should interact with Congress in the legislative process.¹²⁰ The DHS officials noted that the guidance had not been updated in years, but that it helped establish the norms at the agency's founding. The Department of Labor similarly noted that the Secretary's Directive is not something that is reviewed often, but that it reinforces the agency's informal policies and norms for legislative drafting assistance.

Especially in light of the fact that agency concerns discussed in Part II.D.1 that a fair amount of technical drafting assistance occurs at lower levels in the agency without involvement from legislative affairs and legislative counsel personnel, it could be helpful to educate agency program and policy staff and perhaps even memorialize some of the policies and procedures the agency expects to be followed. The formal policies issued by Labor and DHS are helpful starting points for agencies interested in memorializing their legislative drafting assistance policies and procedures.

¹²⁰ See U.S. DEP'T OF HOMELAND SECURITY, LEGISLATIVE PROCEDURES MANAGEMENT DIRECTIVE, MD No. 0420 (Feb. 28, 2005), http://www.dhs.gov/sites/default/files/publications/mgmt_directive_0420_legislative_procedures.pdf; U.S. DEP'T OF LABOR, SECRETARY'S ORDER 11-2006, LEGISLATIVE CLEARANCE PROCESS; DRAFTING LEGISLATIVE PROPOSALS, 71 Fed. Reg. 60802-01 (Oct. 16, 2006); see also U.S. DEP'T OF INTERIOR, MEMORANDUM TO ALL ASSISTANT SECRETARIES, SOLICITOR, BUREAU HEADS, AND HEADS OF OFFICES ON INFORMATION PROVIDED TO CONGRESS (Sept. 2, 2003), http://www.blm.gov/style/medialib/blm/wo/Information_Resources_Management/policy/im_attachments/2006.Par.75654.File.dat/im2006-180attach1.pdf.

2. *Better Identify and Involve Agency Experts in the Technical Assistance Process*

As detailed in Part II.B.4, the agency officials interviewed underscored the importance of including all of the relevant agency experts—and in particular, the agency policy and program experts in addition to the legislative drafting experts—when responding to congressional requests for technical drafting assistance. Seven in ten agency survey respondents, moreover, indicated that agency program/policy experts always (20%) or usually (50%) participate.¹²¹

Although nearly all agency officials interviewed indicated that the informal agency processes and practices usually ensured that the relevant agency experts participated, it may be worth developing more formal networks of agency experts to be contacted when technical drafting requests are made. For instance, at the Department of Energy, the Office of Legislation, Regulation and Energy Efficiency has developed a formal directory of the top fifty agency policy and program experts. This list is just the tip of the iceberg as many more agency officials get involved in responding to various technical drafting assistance requests. But it may be helpful to have a shorter list of initial points of contact within the agency, especially for large agencies with many component agencies.

It is likely that many agencies have implemented similar processes to network with agency experts and distribute technical drafting assistance requests to the relevant agency experts. For instance, one of the agency officials interviewed in the Shobe study mentioned a similar practice:

We have a distribution list that hits every office in the department. We'll forward whatever incoming documents we get to those contacts. If it is specific to one office then we have additional contacts in that program office. We aren't necessarily the subject matter experts in each thing, so we coordinate with the experts to make coherent comments.¹²²

In other words, identifying the relevant agency experts and creating a directory of such experts may just be the first steps; it may also be worth considering whether to distribute all technical drafting assistance requests to that network to ensure that the agency fully leverages its expertise.

3. *Consider Providing Ramseyer/Cordon Drafts as Part of Technical Assistance*

A final potential intra-agency best practice, which is something that at least the Department of Housing and Urban Development (HUD) has implemented, is to provide, when feasible and appropriate, the congressional requester with a Ramseyer/Cordon draft as part of the technical assistance response. A Ramseyer/Cordon draft is a redline of the existing law—not the proposed legislation—that shows how the proposed legislation affects current law by underscoring proposed additions to existing law and bracketing the text of proposed deletions.¹²³ At least in HUD's

¹²¹ Q3(c).

¹²² Shobe, *supra* note 15, at 30

¹²³ See 4 DESCHLER'S PRECEDENTS, ch. 17, § 60 (“The Ramseyer rule provides that whenever a committee reports a bill or joint resolution repealing or amending any statute or part thereof, the committee report is to include the text of the statute or part thereof to be repealed, as well as a comparative print showing the proposed omissions and insertions

experience, it used to be customary for Congress to provide a Ramseyer/Cordon draft early in the drafting process, but that seems to no longer be the case. Accordingly, HUD's Office of Legislation and Regulations routinely creates Ramseyer/Cordon drafts for internal use and as technical assistance to the congressional requester.

This practice may be particularly helpful in combatting one of the biggest challenges identified by the agency officials interviewed and surveyed: as detailed in Part II.D.2, because of turnover and other factors, congressional staffers are often unfamiliar with the agency's governing statutes and routinely propose legislation that duplicates existing law or inadvertently disrupts the current statutory scheme. By providing a Ramseyer/Cordon draft as part of the agency's technical drafting assistance response, the congressional requester can better visualize how the proposed legislation would affect existing law and thus avoid duplication or unintended consequences.

4. Maintain Distinct Roles for and Strong Working Relationship Between Legislative Affairs and Legislative Counsel

Many of the executive agencies—especially those that follow the predominant centralized legislative counsel model discussed in Part II.C.1—emphasized the importance of separate and distinct roles for the legislative affairs staff and the legislative counsel as well as the importance of maintaining a strong working relationship between the two offices. The legislative affairs staff can make difficult, often politically sensitive decisions in their interactions with Congress, but by leaving the technical drafting assistance to the legislative counsel (as well as rest of the agency experts), the agency is able to maintain its expert, non-partisan status in the legislative process. It can also better leverage its institutional memory in legislative drafting. Agencies that expressly noted this as a best practice or important feature include: the Departments of Agriculture, Commerce, Education, Health and Human Services, Homeland Security, and Housing and Urban Development, as well as the Federal Reserve and the Pension Benefit Guaranty Corporation.

Even in a decentralized system like the model embraced by the Department of Commerce, agency officials recognized the importance of maintaining a healthy working relationship and role division between legislative affairs and the rest of the agency personnel involved in providing technical drafting assistance. In particular, legislative affairs handles the day-to-day relationship with Congress while the rest of the agency maintains its nonpartisan, expert status. Indeed, even at the Federal Reserve where the legislative affairs office consists entirely of nonpartisan agency officials, the agency officials interviewed recognized the value of having everything from Congress go

by stricken-through type and italics, parallel columns, or other appropriate typographical devices. The purpose of the Ramseyer rule is to inform Members of any changes in existing law to occur through proposed legislation.”), <http://www.gpo.gov/fdsys/pkg/GPO-HPREC-DESCHLERS-V4/html/GPO-HPREC-DESCHLERS-V4-3-7-3.htm>. Agencies should be familiar with creating Ramseyer/Cordon drafts because Circular A-19 generally requires them for agency-proposed legislation. See OMB CIRCULAR A-19, *supra* note 17, § 7(f)(1)(b) (requiring for agency-proposed legislation that the agency provide a “comparison with existing law presented in ‘Ramseyer’ or ‘Cordon’ rule form by underscoring proposed additions to existing law and bracketing the text of proposed deletions (This need be done only when it would facilitate understanding of the proposed legislation.)”).

through the Congressional Liaison Office (legislative affairs), such that the agency is better able to maintain a strong and productive working relationship with Congress as well as speak with a consistent voice on the Hill.

5. Integrate Technical Assistance Process for Appropriations

As noted in Part D.1, agencies have struggled to integrate the appropriations legislation into the technical drafting assistance process. Appropriations legislation is generally not handled by the legislative affairs office at federal agencies, but by the agency's financial or budget office. Yet, as discussed in Part I.C, Congress in recent years has increasingly inserted substantive provisions or "riders" in appropriations legislation—necessitating more technical drafting review from the agency. Because agency processes for reviewing authorization and appropriations legislation have historically been channeled through different parts of the agency, agencies have had to adapt to provide technical drafting assistance with respect to proposed appropriations legislation.

Several agencies have taken different approaches to address the issue. At the Department of Labor, for instance, the process for providing technical assistance on appropriations is integrated into the general technical assistance process with the addition of the Budget Center's role. One helpful practice at Labor is that one staffer within the general counsel's office is devoted to tracking appropriations in order to make the process even more efficient. The Federal Communications Commission appear to have adopted a similar practice: Within the Office of Legislative Affairs, one agency official is designated as reviewing all proposed appropriations legislation to ensure it is technically sound and to involve the relevant agency experts in the appropriations legislative process.

Another effective innovation on this front comes from the Department of Commerce, which helps coordinate legislative efforts on the appropriations and authorization sides by holding a weekly meeting between the Director of the Office of Budget, the Chief Counsel for Legislation, and the Assistant Secretary for Legislative and Intergovernmental Affairs. Similarly, although the Department of Agriculture has not formalized a weekly meeting, the agency officials interviewed underscored that the agency has placed great emphasis on cultivating a strong working relationship between its Office of General Counsel and its Office of Budget and Program Analysis.

Finally, the Department of Education has taken a number of measures to incorporate the review of appropriations legislation in the technical drafting assistance process. Because a fair amount of appropriations legislation is not expressly directed at the Department of Education but nevertheless affects education programming, the Division of Legislative Counsel tracks such legislation and keeps the Budget Service and the rest of the Department apprised of such developments.

B. Best Practices to Strengthen Agency-Congress Relationship in Legislative Process

1. Strive to Respond to Each Congressional Technical Drafting Assistance Request

As detailed in Part II.B.3, the agency officials interviewed and surveyed for this Report repeatedly emphasized that their agencies attempt to respond to virtually every request they receive from Congress for technical assistance in legislative drafting. Responding to congressional technical drafting assistance requests, the agency officials emphasized, (1) assists the agency in maintaining a healthy and productive working relationship with Congress, (2) ensures that the proposed legislation does not unnecessarily disrupt the existing statutory and regulatory scheme, (3) helps educate the congressional staffers about the agency’s existing statutory and regulatory framework, and (4) keeps the agency informed of potential legislative action that could affect the agency.

Accordingly, federal agencies should strive to respond to each congressional request for technical drafting assistance—regardless of whether the request comes from the majority or minority party, from a congressional committee or Member staffer, or from a Member from the President’s party; of the likelihood that the proposed legislation will actually be enacted; or of whether the proposed legislation furthers the agency’s objectives—just to name a few factors. That agencies should respond to each request when feasible does not necessarily mean they should expend the same amount of time and resources on each and every request.

2. Engage in More Congressional Education Efforts and In-Person Interaction

During the agency interviews, a recurring theme mentioned by the vast majority of agency officials interviewed is that the agency must cultivate its relationship with congressional staffers by visiting them in person and by engaging in extensive efforts to educate them about the agency’s statutory and regulatory scheme, its effective programs and initiatives, and its current challenges. In-person, face-to-face meetings on the Hill are critical to developing these relationships.¹²⁴

The Labor Department, for instance, actively engages congressional staffers in face-to-face interactions in order to build relationships of trust. As part of that effort the Department will often coordinate for agency program and policy experts to go to the Hill to brief congressional staff on the work of each component agency so congressional staffers (and the Members) are more informed when it comes to legislative drafting and review—and, of course, when it also comes to congressional oversight efforts.

The Department of Homeland Security engages in similar in-person educational efforts, but it also noted that bringing legislative counsel to Congress from the outset of the drafting process on a

¹²⁴ *Accord* PARTNERSHIP FOR PUBLIC SERVICE, GOVERNMENT DISSERVICE: OVERCOMING WASHINGTON DYSFUNCTION TO IMPROVE CONGRESSIONAL STEWARDSHIP OF THE EXECUTIVE BRANCH 12 (Sept. 2015) (“Agency leaders should be proactive in building and owning congressional relationships and use their congressional affairs staff to strengthen their presence on Capitol Hill, not insulate them from it. Further, agency leaders should hold their staff accountable for developing positive working relationships with members and staff.”).

particular piece of legislation allows the technical drafters and agency experts to have access and provide feedback during the critical initial-drafting stage. By not only bringing policy and program experts but also legislative drafting experts, the congressional staffers are made aware of the agency's expert technical drafting assistance and are more likely to take advantage of those resources earlier in their legislative drafting initiatives.

3. *Consider Leveraging Expertise to Provide Other Forms of Assistance*

A related best practice that may be worth considering at many agencies is to explore ways in which the agencies can leverage their expertise and resources to provide forms of technical assistance other than just legislative drafting. As David Epstein and Sharyn O'Halloran have noted, "the executive branch is filled (or can be filled) with policy experts who can run tests and experiments, gather data, and otherwise determine the wisest course of policy, much more so than can 535 members of Congress and their staff."¹²⁵

The Pension Benefit Guaranty Corporation (PBGC) is perhaps exceptional in this respect. Unlike most other agencies, the PBGC's main technical assistance to Congress involves providing economic modeling for proposed legislation. This is an invaluable resource for Congress, and other agencies with empirical analysis resources may want to consider providing similar technical assistance in the legislative process to improve legislative outputs and to strengthen their relationship with Congress. Indeed, officials at the Federal Reserve indicated that the agency does not just assist in technical drafting of legislation, but it also shares the agency's economic and policy expertise by briefing congressional staffers on the cutting-edge research being published by economists and policy analysts at the Federal Reserve. A fair amount of the Federal Reserve's interaction with Congress involves such education efforts about the expert research and analytic/empirical research capacity that the agency possesses and is willing to share with Congress.

It may be the case that the PBGC and Federal Reserve are uniquely positioned to share expertise with Congress other than purely technical drafting assistance—but probably not. Many other agencies can and should explore ways to leverage their expertise to assist Congress in its legislative initiatives. To provide but one example, agencies could consider communicating the results of their regulatory impact analyses to Congress, given that Congress often writes statutes in a way that regulatory costs will necessarily exceed regulatory benefits (leaving the agency no discretion to produce a utility-maximizing regulation). Such sharing of agency expertise not only would help improve the legislative outputs, but it would also strengthen the agency-congressional relationship.

¹²⁵ David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 967 (1998). To be sure, the Congressional Research Service (CRS), a legislative branch entity housed within the Library of Congress, also provides policy and legal analysis to Congress. For more on CRS, visit <http://www.loc.gov/crsinfo/>. Federal agencies, however, can and should leverage their on-the-ground expertise to supplement the excellent work already being done by CRS.

4. Explore Opportunities for Agency Staff to Detail in Congress

A number of agencies noted the value of having agency staff who have worked in Congress—not just legislative affairs staff with Hill experience (which is common across agencies) but also legislative counsel and other agency personnel who are often involved in the technical drafting assistance process. At the Department of Energy, for instance, four of the six officials in the Office of Legislation, Regulation, and Energy Efficiency worked in Congress prior to joining the office. This Hill experience, the agency officials explained, is a tremendous resource when providing technical assistance in legislative drafting.

Many agency legislative counsel and other personnel involved in the technical drafting assistance process have had no such prior experience. But a number of agencies have created that experience by having their legislative counsel and policy personnel detail on congressional committees. For example, agency officials at the Federal Communications Commission, especially at the bureau level, often detail in Congress. Detailing attorneys from the USDA's Office of General Counsel during the Farm Bill reauthorization is also quite common, and proves invaluable during the reauthorization process but also afterward as it strengthens the agency's relationship with Congress and results in attorneys who have greater expertise in the legislative process and more familiarity with the key players on the Hill.

The Department of Housing and Urban Development has also experimented with detailing attorneys to Congress. Two of the attorneys in the Office of Legislation and Regulations have worked on the Hill, and the Office has found that experience to be very valuable. One attorney did a detail on the Hill through the Brookings Institute's Legis Congressional Fellowship.¹²⁶ It may be worth considering whether to establish a more formalized program across the federal administrative state to set up such details in Congress—similar to the successful arrangements already established for intra-executive branch details.

CONCLUSION

As the Report illustrates, federal agencies routinely and extensively participate in the legislative process. There are few bills that get enacted (or even introduced) which have not first been reviewed and revised by the agencies that will ultimately administer those statutes. These findings have profound implications for how we view the congressional-agency relationship as something more nuanced than the traditional principal-agency relationship posited by positive political theorists; for how we think about the proper approach to agency statutory interpretation and whether, as legal scholars have advocated, it should be more purposivist in nature than judicial interpretation; and for how we think about judicial deference to agency statutory and regulatory interpretations in light of the fact that agencies are often drafting the legislation they are subsequently interpreting via regulation—just to provide a few examples.

¹²⁶ For more information on the Legis Fellowship, visit <http://www.brookings.edu/about/execed/legis-fellowship>.

The findings uncovered and recommendations proposed in the Report should also help federal agencies improve the practices and procedures they utilize to provide technical assistance in statutory drafting and, in turn, to further strengthen their day-to-day working relationship with Congress. But, above all, the Report should underscore the importance of further empirical study and theoretical development about the role of federal agencies in the legislative process. Much more work needs to be done to understand how federal agencies can improve in their provision of technical assistance; how (or if) the Office of Management and Budget can assist agencies in carrying out their legislative technical drafting assistance role; and how Congress can take better advantage of the vast experience and expertise in the modern administrative state. Federal agencies, Congress, and OMB—as well as scholars and students of administrative law—should earnestly examine how to improve the ways agencies provide technical assistance in statutory drafting.

APPENDIX A: SURVEY INSTRUMENT AND RESPONSES

Question 1. For each category of legislation listed below, please indicate how often your agency provides technical assistance:

[CLARIFICATION NOTE: This question explores how often the agency provides technical assistance for bills that ultimately reach different stages of the legislative process—not whether the agency provides technical assistance AFTER enactment, introduction, etc.]

#	Question	Never	Rarely	Sometimes	Often	Usually	Always	Total Responses	Mean
a	Introduced legislation that directly affects the agency	0	0	3	4	3	0	10	4.00
b	Introduced legislation that indirectly affects the agency	0	1	6	3	0	0	10	3.20
c	Enacted legislation that directly affects the agency	0	0	2	2	5	1	10	4.50
d	Enacted legislation that indirectly affects the agency	0	2	7	0	1	0	10	3.00
e	Appropriations legislation that directly affects the agency	0	1	2	1	2	4	10	4.60
f	Appropriations legislation that indirectly affects the agency	1	3	4	2	0	0	10	2.70

Comments (optional):

Text Response

1. Item (c): “Enacted legislation that directly affects the agency.” Our answer (usually) assumes that the intent was to ask how often we provide technical assistance *before* enactment on legislation that is *ultimately* enacted. We rarely if ever provide technical assistance after a bill is enacted.
2. The goal is to always be responsive to requests from the Hill for technical drafting assistance, however, an analysis of whether a particular piece of legislation is moving could influence the amount of time and effort spent on a request.
3. The questions regarding appropriations legislation are more expertly answered by our CFO; this was an educated guess on the part of the legal office. Regarding legislation that directly affects the agency, I responded sometimes because legislation that directly affects, for example, a government-wide personnel issue may not come to us first for technical drafting assistance.

Question 2. Please indicate how often the following factors affect whether your agency decides to provide technical assistance requested by Congress:

#	Question	Never	Rarely	Sometimes	Often	Usually	Always	Total Responses	Mean
a	Whether the proposed legislation is likely to be enacted	2	6	1	1	0	0	10	2.10
b	Whether Congress has provided a reasonable deadline to review and provide technical assistance on legislation	1	3	4	2	0	0	10	2.70
c	Whether the agency has sufficient time/resources available to review and provide technical assistance on legislation	1	4	4	1	0	0	10	2.50
d	Whether the technical assistance request is for redline/comments on draft bill language (as opposed to a	1	5	2	2	0	0	10	2.50

	request for the agency to draft bill language from scratch based on specifications provided by congressional staff)								
e	Whether the proposed legislation furthers agency objectives (as opposed to undermining agency objectives)	2	3	2	1	2	0	10	2.80
f	Whether the technical assistance request comes from committee staff (as opposed to an individual member's staff)	2	4	2	2	0	0	10	2.40
g	Whether the technical assistance request comes from majority committee/member staff (as opposed to minority staff)	3	5	1	1	0	0	10	2.00
h	Whether the technical assistance request comes from committee/member staff of member from the President's party	3	3	1	1	2	0	10	2.60

Other/Comments (optional):

Text Response	
1.	We strive to accommodate all requests and do so "blind" to the chamber, to the majority or minority status of the requesting party, to the nature of the request (i.e., from committee staff or Member staff), or the likelihood of action. Those elements, however, may affect the priority placed on the assistance provided. If anything, scope and timing dictate the amount of assistance provided. Rarely, do we refuse to provide assistance, and only if there is good cause to do so (e.g., the request goes to legislation that is repugnant to public policy or the interests of the United States).
2.	Items (g)-(h) (Whether the request comes from majority as opposed to minority, or from the President's party as opposed to the other party). This may vary from administration to administration. In some administrations, all (or almost all) requests are honored; in others, the Department is more responsive to majority, or to the President's party.
3.	The agency always responds to technical comments requests; we may put more or less time or resources into requests that come from, for example, our authorizing committees versus another, more tangentially-related committee.

Question 3. Please indicate how often the following actors are involved in your agency's response to a congressional request for technical assistance in legislative drafting:

#	Question	Never	Rarely	Sometimes	Often	Usually	Always	Total Responses	Mean
a	Agency's Legislative/Congressional Affairs Staff	0	0	0	1	5	4	10	5.30
b	Agency's Legislative Counsel (for example, attorneys in the agency's Chief or General Counsel Office)	0	0	1	1	4	4	10	5.10
d	Agency's Program/Policy Experts	0	1	2	0	5	2	10	4.50
e	Agency's Rulemakers/Regulatory Staff	1	6	1	0	2	0	10	2.60

f	Office of Management and Budget	2	4	3	1	0	0	10	2.30
g	Regulated Entities and Other Outside Organizations	4	5	0	0	0	0	9	1.56

Other/Comments:

Text Response

1. As a rule, we do NOT provide drafting assistance to any entity beyond the U.S. Government.
2. Item (d) (rulemakers, regulatory staff). Our answer (never) pertains to staff who are dedicated regulation writers. Other program staff are often involved in developing regulations and in the regulatory process; they participate more frequent in developing technical assistance than to dedicated regulation writers. Item (f) (regulated entities and outside entities). This may differ from administration to administration.
3. Legislation/regulatory attorneys are in the same office at our agency, so regulatory staff have the same input as the agency's legislative counsel, as appropriate for a given request.

Question 4. Please indicate how often the technical assistance provided by your agency is in the following formats:

#	Question	Never	Rarely	Sometimes	Often	Usually	Always	Total Responses	Mean
a	Oral communication of comments and suggestions	0	1	3	4	2	0	10	3.70
b	Agency redline of draft legislation provided by congressional staffer	0	0	2	4	4	0	10	4.20
c	New suggested legislation drafted by agency	0	2	5	3	0	0	10	3.10
d	Written feedback in a form other than a redline or actual draft legislation (for example, email or memo summarizing technical feedback)	0	0	0	7	3	0	10	4.30

Other/Comments (optional):

Text Response

1. Item (c). Technical assistance sometimes (or even often) *includes* new legislative language suggested by the Department, but it rarely (if ever) includes a new suggested text of the entire bill.

Question 5. Please indicate how often the following factors seem to affect whether Congress adopts the technical assistance provided by your agency:

#	Question	Never	Rarely	Sometimes	Often	Usually	Always	Total Responses	Mean
a	Whether the proposed legislation is likely to be enacted	0	1	3	5	0	1	10	3.70
b	Whether there is a strong working relationship between the agency officials involved and the congressional staffers requesting assistance	0	0	4	3	3	0	10	3.90
c	Whether the technical assistance was provided prior to the legislation being	0	1	3	6	0	0	10	3.50

	introduced (as opposed to, for instance, at the committee markup stage or later)								
d	Whether the technical assistance consists of suggested redlined changes to draft legislation (as opposed to more generalized feedback)	0	1	2	6	1	0	10	3.70
e	Whether the technical assistance was provided for committee staff (as opposed to an individual member's staff)	0	2	5	2	1	0	10	3.20
f	Whether the technical assistance was provided for majority committee/member staff (as opposed to minority party staff)	0	2	5	2	1	0	10	3.20
g	Whether technical assistance was provided for committee/member staff of member from the President's party	0	2	7	1	0	0	10	2.90
h	Whether the technical assistance was provided for committee/member staff of member who supports the agency's objectives	0	2	4	3	1	0	10	3.30

Other/Comments (optional):

Text Response

1. We don't always know whether our comments are accepted—if, for example, the legislation doesn't go anywhere, we might not know whether they took our suggestions.

Question 6. Please evaluate your agreement with the following statements about potential challenges to providing technical assistance in legislative drafting:

#	Question	Strongly Disagree	Disagree	Somewhat Agree	Agree	Strongly Agree	Total Responses	Mean
a	The timing for responding to congressional requests for technical drafting assistance is unpredictable and/or difficult to meet.	0	1	4	4	1	10	3.50
b	It is difficult to distinguish purely technical assistance from substantive drafting assistance that should go through OMB Circular A-19 review.	0	3	4	2	0	9	2.89
c	Because the OMB review process is so cumbersome or opaque, the agency often tries to find a way to respond to a congressional request for more substantive feedback without	0	2	5	2	0	9	3.00

	going through the OMB process.							
d	When congressional requesters say they want technical assistance, what they often really want is to know the agency's substantive position on the proposed legislation	0	0	6	4	0	10	3.40
e	The appropriations process at the agency is not sufficiently incorporated into the agency's technical drafting review process.	0	6	3	0	0	9	2.33
f	Technical legislative assistance often takes place at lower levels within the agency without going through the formal approval processes (including review and approval by congressional affairs, legislative counsel, etc.) that the agency has established.	2	2	4	2	0	10	2.60
g	Congressional staffers often are unfamiliar with the agency's governing statutes and implementing regulations.	0	1	4	4	1	10	3.50
h	The turnover of staff in Congress makes it difficult for the agency to have a strong working relationship with Congress.	0	3	4	3	0	10	3.00

Other/Comments (optional):

Text Response

- Item (c) (OMB review process). We definitely agree that the OMB review process is in fact cumbersome or opaque. The answer above (somewhat agree) addresses the second part of the statement—whether we often try to find a way to respond without going through the process. However, our responses in such situations comply with Circular A-19.
- The last question is perhaps more appropriately addressed by our congressional affairs office.

APPENDIX B: AGRICULTURE OVERVIEW

OVERVIEW OF TECHNICAL ASSISTANCE TO CONGRESS AT U.S. DEPARTMENT OF AGRICULTURE*

I. Overview of Agency

The U.S. Department of Agriculture (USDA) was born out of the work of attorney Henry Leavitt Ellsworth, the first Commissioner of Patents, who encouraged the collection and distribution of seeds through the U.S. Postal Service and was able to secure the first congressional funding for agriculture in 1839. However, it wasn't until May of 1862 that President Abraham Lincoln officially established the Department of Agriculture.¹ The new department was tasked with acquiring and distributing “useful information on subjects connected with agriculture in the most general and comprehensive sense of that word” and procuring, propagating, and distributing “new and valuable seeds and plants.” The establishing legislation further called for comprehensive and accurate record keeping, which led to the establishment of the National Agricultural Library. The library was specifically mentioned in appropriations for the department starting in 1864.

The current work of the USDA spans a number of broad policy areas: assistance to rural communities, conservation and forestry, education and research, food and nutrition, animal and plant health, food safety, and marketing and trade. From inspecting and licensing the facilities that process food, to providing broadband internet to underserved communities, to administering the multi-billion dollar SNAP program, the work of the USDA touches the lives of every American and despite the breadth of topics the agency oversees, the USDA uniquely relies on a single piece of legislation every 5-6 years to authorize almost all of its activities—the Farm Bill.²

II. Agency Process for Providing Technical Assistance for Legislative Drafting

The USDA provides technical assistance to Congress on three distinct types of legislation: appropriations, the Farm Bill, and other more traditional legislation that may affect the USDA. USDA is unique in that the Farm Bill governs most of the activities of the agency. A new Farm Bill is considered approximately every 5-6 years with the most recent update in 2014. The Office of General Counsel (OGC) at USDA has a longstanding relationship with the committees on the Hill that are involved in drafting and pulling together all the titles of the Farm Bill.

* This overview draws on interviews and communications with various officials at the U.S. Department of Agriculture as well as from publicly available information. Thanks are due to Eleanor Celeste (The Ohio State University Moritz College of Law Class of 2016) for spearheading the research and drafting of this overview.

¹ For more information on the Department's mission and organization, visit <http://www.usda.gov/wps/portal/usda/usdahome>.

² For one perspective on the Farm Bill reauthorization process, see Neil D. Hamilton, *The 2014 Farm Bill: Lessons in Patience, Politics, and Persuasion*, 19 *DRAKE J. AGRIC. L.* 1 (2014).

Usually, the agriculture committee staff do the initial drafting of the Farm Bill. After which, OGC staff go to the Hill to meet with committee staff. Often there are policy considerations as to the extent OGC participates in the conversations, but generally almost every page of the Farm Bill receives some level of legal review. A key to success in providing effective technical assistance is drafting and revising legislative language to match the style of the legislative counsel on the committees at any given time. Technical assistance is most effective when drafted in the style of the office of legislative counsel in charge of the bill or a title because language is more likely to stay in the bill and is less likely to be subject to editing that can lead to legal errors if it already fits the committee's and the counsel's style.

If a member wants USDA technical assistance on a Farm Bill issue, they generally approach the Department's Office of Congressional Relations (OCR) directly or through committee staff. OCR acts as the clearing house before OGC can give technical advice on how a given proposal would affect different programs and the agency overall. However, sometimes committee staff go directly to OGC staff with specific questions for which OGC generally alerts OCR to before responding.

At times there are USDA-related, non-appropriations legislation that is not part of the Farm Bill. These legislative initiatives are either one-off bills introduced by members to address a program area covered by USDA or bills that implicate a particular USDA agency, such as the Forest Service. These bills go first to OCR—the gatekeeper for agency-congressional relations and the official liaison to Congress—or the mission area congressional relations staff, and then to OGC for technical drafting assistance.

A. Role of Agency's Congressional Affairs Staff

The Department's Office of Congressional Relations (OCR) consists of about a half-dozen officials, most of whom are political appointees with prior experience working on the Hill. The Assistant Secretary for Congressional Relations directs the office and reports to the Deputy Secretary and Secretary.

The Office acts as a gatekeeper and manager of the majority of the requests for technical assistance that come into USDA. Sometimes, staff and members will go straight to OGC or the Office of Budget and Program Analysis (OBPA) because of a personal or professional relationship. However, the vast majority of congressional requests for technical assistance in legislative drafting are first filtered through the Office of Congressional Relations and then directed to OGC or to OBPA.

B. Role of Agency's Legislative Counsel

The Office of General Counsel (OGC) handles the legislative drafting portfolio and reports to the Deputy Secretary and the Secretary. Previously, there was a separate legislative division within OGC; however, that division was folded into the general law and research division. Three to four of the seventeen attorneys in the general law and research division do legislative work specifically

related primarily to appropriations, Departmental Administration, the research, education, and economics mission area, and miscellaneous matters. Additionally, other divisions of OGC provide technical legislative drafting assistance in the areas covered by their client agencies. All draft language is considered close hold, and OGC generally does not share any language they are providing as technical assistance except as directed by the requester or OCR.

OGC attorneys working on the legislative portfolio generally do not have specific Hill experience prior to joining the USDA, but several have been through multiple farm bills. . Additionally, OGC has found it useful in the past to detail one of its attorneys to the Agriculture Committees during the Farm Bill reauthorization. That way, the staffer can provide informed advice about how a new farm bill will affect the USDA and learn the process from the legislative side. The staff member returns to USDA with first-hand legislative experience and is able to be an even more effective legislative lawyer in OGC.

OGC handles most of the technical assistance requests that come from Congress. When working on appropriations, OGC works closely with OBPA and consults with OCR as appropriate. Aside from appropriations, most technical assistance requests outside of the Farm Bill process come through OCR or the congressional relations staff of USDA mission areas.

C. Role of Agency's Policy, Regulatory, and Other Personnel

The Office of Budget and Program Analysis (OBPA) participates extensively in providing technical assistance on appropriations matters. OBPA has the expertise to answer complicated questions about how certain proposals will affect the budget and program areas specifically. OBPA is the office that coordinates with OMB when necessary. OBPA acts as a gatekeeper for appropriations questions and sometimes loops in the specific agency congressional relations or budget staff, depending on the assistance requested.

With respect to the USDA's other policy and program personnel, OGC generally has a close-hold policy and only involves such agency personnel when authorized. This is particularly true for appropriations legislation that goes to OBPA.

D. Role of Office of Management and Budget

The USDA generally does not clear technical assistance requests with the Office of Management and Budget, but both OGC and OBPA ensure that the Department complies with Circular A-19 with respect to the Department's substantive positions on legislation. Again, the USDA is in somewhat of a unique position with the Farm Bill, as that process involves policy personnel from the Department and the Administration in addition to the agency legislative counsel.

III. Technical Drafting Assistance as Part of Appropriations Process

The Office of Budget and Program Analysis (OBPA) is heavily involved in the technical assistance provided as part of the appropriations process. OGC also plays a role in providing that technical assistance. These exchanges are based on relationships built on trust and confidence. OGC works in a way that maintains a reputation for not making policy, but strictly providing professional legal review when providing technical assistance.

During the appropriations process OGC in consultation with OBPA is sometimes asked by committee staff to provide technical assistance to revise entire accounts. Revising entire accounts is usually an exercise to shorten the entire bill and clean up the language to eliminate superfluous text. These requests are processed by OBPA in conjunction with OGC and generally are not initially sent to OCR. Generally, OGC and OBPA just clean up the language and flag potential problems or unclear drafting. These requests usually come at the last minute during committee markup. If OGC or OBPA is asked to provide assistance on a particularly hot button policy issue or will be working with a committee on a daily basis on a specific matter, they will loop in OCR as part of the discussions.

IV. Effective Practices and Features Implemented at the Agency

1. *Farm Bill Reauthorization Process*: With a reauthorization occurring every 5-6 years, this allows the USDA to forge strong relationships on the Hill and maintain its institutional expertise over the subject matter.
2. *Congressional Detailing*: The detailing of attorneys from the USDA's Office of General Counsel during farm bill reauthorizations proves invaluable during the reauthorization process but also afterward as it strengthens the agency's relationship with Congress and results in an attorney who has great expertise in the legislative process.
3. *Appropriations Legislation Coordination*: Because a fair amount of substantive legislation is now included in appropriations legislation, it is of even greater importance that the budget and legislative counsel teams work together to provide technical assistance on appropriations legislation. The USDA has cultivated a strong working relationship between its Office of General Counsel and its Office of Budget and Program Analysis.
4. *Reputation as Professional Drafters*: It is a tremendous value to have legislative counsel within the Office of General Counsel who are career attorneys with no political ties to the current administration, so that their counsel is viewed as technical and nonpartisan.

APPENDIX C: COMMERCE OVERVIEW

OVERVIEW OF TECHNICAL ASSISTANCE TO CONGRESS AT THE U.S. DEPARTMENT OF COMMERCE*

I. Overview of Agency

The Department of Commerce’s mission is to create the requisite conditions for economic growth and opportunity. The Department works with businesses, universities, communities, and workers to promote job creation, economic growth, sustainable development, and improved standards of living for Americans. The Department is comprised of twelve bureaus that drive progress in five goal areas: trade and investment, innovation, environment, data, and operational excellence.¹

II. Agency Process for Providing Technical Assistance for Legislative Drafting

The Office of Legislative and Intergovernmental Affairs serves as the gatekeeper and face of the Department to Congress. Technical assistance requests are sent on to the Office of the General Counsel’s Assistant General Counsel of Legislation and Regulations (AGC-L&R), which coordinates the responses to such requests with the various lawyers and program folks within the relevant bureaus. The Office of Legislative and Intergovernmental Affairs maintains oversight on progressing requests.

Each bureau within the Department has its own legislative affairs offices—staffed mostly by political appointees—and the Department’s and bureaus’ legislative affairs offices coordinate in responding to congressional requests for legislative drafting assistance. Technical assistance by definition does not take a substantive view on an issue, but this understanding may be inconsistent with congressional expectations. The AGC-L&R therefore regulates the Department’s desire to be as responsive as possible to Congress without getting ahead of the Secretary of Commerce or the Administration.

Typically, the congressional requester sends a draft of the contemplated legislation for technical assistance and comments from the agency; technical assistance requests that involve initial drafting are rare. The form of assistance will vary depending on the specific request involved, but may involve redlining a bill or making global comments.

* This overview draws on interviews and communications with various officials at the U.S. Department Commerce as well as from publicly available information. Thanks are due to Ally Chiu (Harvard Law School Class of 2017) for spearheading the research for and drafting of this overview.

¹ For more information on the agency’s mission and organization, visit <http://www.commerce.gov/about>.

A. Role of Agency's Congressional Affairs Staff

The Office of Legislative and Intergovernmental Affairs is located within the Office of the Secretary.² The Assistant Secretary of Legislative and Intergovernmental Affairs is aided by a Deputy Assistant Secretary, a Director of Legislative Affairs, and a Director of Intergovernmental Affairs. The Legislative Affairs office is responsible for liaison and coordination with Congress, congressional committees, and individual Members. They ensure the Department's responsiveness to inquiries or requests for information, reports, or other assistance from Members and their staffs. In contrast, the Intergovernmental Affairs office is the liaison and coordinates with state, county, and municipal governments, and oversees the maintenance of their relationships with the Department.³

The Office of Legislative and Intergovernmental Affairs consists of about a dozen staff members, all political appointees, who generally all have worked in Congress at some point and some of whom also have law degrees. Each bureau also has a counterpart to the Office of Legislative and Intergovernmental Affairs, comprised mostly of political appointees, as well as some career staff for continuity. The Department and bureau legislative affairs offices work together to respond to congressional requests for legislative drafting assistance.

B. Role of Agency's Legislative Counsel

The Office of the Assistant General Counsel for Legislation and Regulations (OAGC-L&R) is located within the Office of the General Counsel.⁴ The Office is headed by an Assistant General Counsel who is assisted by the Chief Counsel for Legislation and the Chief Counsel for Regulation. The Legislative Division works with various bureaus to develop and support the Department's legislative initiatives and is the focal point within the Department for coordinating the analysis of legislation and developing and articulating the views of the Department on pending legislation. This office is the principal legal liaison with the Office of Management and Budget (OMB), with whom it works to obtain required clearances and interagency consensus on Departmental letters, reports, testimonies, and legislative proposals for delivery to Congress. The office also represents the Department's views in interagency deliberations on legislative proposals and expressions of legislative views advanced by other agencies.

The Legislative Division is staffed by five attorneys and two support staff. The attorneys have each been assigned bureaus of the Department of Commerce. The Legislative Division attorneys work closely with bureau chief counsel offices in the provision of technical drafting assistance.

² For the Department of Commerce's organization chart, visit http://www.commerce.gov/sites/commerce.gov/files/media/files/2014/departments_organization_chart.pdf.

³ For more information on the Office of Legislative and Intergovernmental Affairs, visit http://www.osec.doc.gov/opog/dmp/doors/doo10_12.html.

⁴ For more information on offices within the Department of Commerce's Office of the General Counsel, visit <http://ogc.commerce.gov/>.

These bureau offices often play a significant role in technical assistance, while AGC-L&R becomes more involved for cross-agency bills. The Department's Legislative Division is almost always involved if real technical drafting is taking place, but it is not always brought into the loop when there are only questions of proposed legislation. Those requests may be handled by just the legislative affairs staff, in coordination with the relevant bureau program and legal staff.

C. Role of Agency's Policy, Regulatory, and Other Personnel

The Regulatory Division within the OAGC/L&R, discussed above, serves as the primary contact for all regulatory matters concerning the Department. This office advises the diverse bureaus within the Department on administrative law requirements and procedures involved in the rulemaking process, and provides legal counsel on other related laws and Executive Orders. It also serves as the Department's liaison with OMB and other Federal agencies during interagency review and clearance of regulations issued by the Department, and provides Secretarial-level clearance for all Federal Register publications. In addition, this office advises the Secretary on regulatory matters, develops the Department's regulatory policies and procedures, and provides the Department's official position on regulations affecting the Department. There are five members of the Regulatory Division, including the Chief Counsel for Regulation. There are no specialized distinctions between the members in title, unlike the Legislative Division which differentiates based on the various departmental bureaus.⁵ The Regulatory Division seldom plays a role in providing technical assistance in legislative drafting.

Bureau program and policy experts and counsel, by contrast, play an important role in providing technical drafting assistance. Generally the Department's Office of Legislative and Intergovernmental Affairs coordinates such feedback from the bureaus, in coordination with OGC's Legislative Division.

D. Role of Office of Management and Budget

The Office of Management and Budget (OMB) is not usually involved in the process for technical assistance requests. It only becomes involved when the Department wishes to take a substantive position on pending legislation, in which case the Department follows the procedures set forth in Circular A-19.

III. Technical Drafting Assistance as Part of Appropriations Process

Technical assistance requests related to the appropriations process are handled directly by the Department of Commerce's Chief Financial Officer and Assistant Secretary for Administration and the Director of the Office of Budget. Each bureau also has its own budget office. The Chief Financial Officer nonetheless keeps the Chief Counsel for Legislation abreast of appropriations

⁵ For more information on the OGC's Regulatory Division within AGC-L&R, visit <http://ogc.commerce.gov/collection/office-assistant-general-counsel-legislation-and-regulation>.

matters during weekly meetings. The Office of Legislative and Intergovernmental Affairs coordinates appropriations matters between the Department and relevant bureaus. The Legislative Division in the Office of General Counsel is not involved in the appropriations process unless appropriations legislation contains substantive provisions that may need technical review.

IV. Effective Practices and Features Implemented at the Agency

1. *Appropriations and Authorization Legislative Assistance Coordination:* Each week the Director of the Office of Budget, the Chief Counsel for Legislation, and the Assistant Secretary for Legislative and Intergovernmental Affairs meet to discuss interactions with Congress and other matters.
2. *Relationship Between Legislative Counsel and Legislative Affairs:* The Department has maintained a close working relationship between the legislative affairs staff who deal directly with Congress and the legislative counsel who help coordinate the provision of technical assistance in the legislative process. This relationship is critical, especially when there is also extensive coordination efforts that need to be made with the relevant bureau-level legislative affairs, counsel, policy, and program folks. Moreover, the Department splits the recordkeeping between the Office of Legislative and Intergovernmental Affairs and AGC-L&R in a logical scheme—in particular, the former retains informal communications while the latter keeps formal records, ensuring that information is easily accessible when necessary.

APPENDIX D: EDUCATION OVERVIEW

OVERVIEW OF TECHNICAL ASSISTANCE TO CONGRESS AT THE U.S. DEPARTMENT OF EDUCATION*

I. Overview of Agency

The U.S. Department of Education was established in 1979 and became operational in 1980 through the Department of Education Organization Act (DEOA). The creation was the result of the transfer of various offices and functions from other agencies, principally from the Education Division of the Department of Health, Education, and Welfare (which was re-named the Department of Health and Human Services) to the Department. The DEOA created ten offices including: the Office for Civil Rights, the Office of Elementary and Secondary Education, the Office of Postsecondary Education, the Office of Vocational and Adult Education, the Office of Special Education and Rehabilitative Services, the Office of Education for Overseas Dependents, the Office of Educational Research and Improvement, the Office of Bilingual Education and Minority Language Affairs, the Office of General Counsel (OGC), and the Office of Inspector General. Over the years, Congress has adapted and expanded the Department in response to national needs, including by adding and eliminating individual offices as statutory entities and by renaming several of the ten original offices.¹

The Department's mission is to provide for America's students by encouraging academic achievement, promoting equal access to education, and preparing students for global competitiveness. To do this, the Department seeks to institute policies for federal student aid, to collect and disseminate data on America's schools, to focus on national key issues related to education, and to provide equal access to education while prohibiting discrimination.²

II. Agency Process for Providing Technical Assistance for Legislative Drafting

The Department provides technical assistance for legislative drafting by reviewing and sometimes drafting legislative proposals. For instance, the Department may provide redline feedback on a draft or suggest how they might draft it; however, they clarify that their suggestions do not reflect a formal proposal or an official initiative from the Department of Education or the Administration. Their assistance is merely a courtesy, and technical in nature. While the technical assistance process is not very formal due to a more hands-off approach from OMB than in the past,

* This overview draws on interviews and communications with various officials at the U.S. Department of Education as well as from publicly available information. Thanks are due to Rita Rochford (The Ohio State University Moritz College of Law Class of 2017) for spearheading the research for and drafting of this overview.

¹ To see a chart on the current structure of the Department of Education visit <http://www2.ed.gov/about/offices/or/index.html>.

² For more information on the Department's mission and organization, visit http://www2.ed.gov/about/overview/focus/what_pg2.html.

the Department sends out occasional internal reminders for the preferred process to follow, particularly at the start of an Administration or when key officials are replaced.

Except with respect to budget and appropriations matters (discussed below), Congressional requests for technical assistance in legislative drafting (which includes drafting report language as well as legislative text) go through the Department's Office of Legislation and Congressional Affairs (OLCA), which serves as the Department's legislative gatekeeper and liaison to Congress. Typically, Members of Congress, or their staff, reach out to OLCA via email or phone. Most of the requests come from committee staff, but also sometimes from the personal staff of a Member. OLCA then coordinates the technical drafting assistance response with the Division of Legislative Counsel (DLC) within the Office of Counsel (OGC). DLC then takes the lead in providing the technical assistance, with both offices consulting the relevant policy and program experts and lawyers within the Department to provide feedback about potential impacts.

In recent years, the Department has spent more time than it used to in providing background on current law to inform Congress before it begins the drafting process. The Department's technical assistance ranges from commenting on draft legislation for legal implications or burdens to affected parties to working with Members of Congress to understand their objectives and help provide legislative language that works toward their goal. To meet these requests, the Department relies on their employees' program expertise. The mechanism for feedback is a collaborative process in which each member of the team understands the implications involved in meeting a deadline for feedback. This feedback may be done through meetings, email, or phone—oftentimes the communication is done via a conference call that includes the relevant agency experts and policy officials.

A. Role of Agency's Congressional Affairs Staff

The Department's Office of Legislation and Congressional Affairs is the primary liaison between the Department and Congress, coordinating all Department matters relevant to Congress (other than appropriations matters), including congressional requests for technical assistance in legislative drafting. Headed by an Assistant Secretary who is apolitical appointee, the Office's organizational structure consists of political leadership who work to effectively communicate the Administration's position on education issues, career staff for policy who advise on legislation, and congressional affairs staff who aid in resolving constituent concerns. In total, there are about two dozen staffers in the Office, many of whom have extensive Hill experience and some of whom have law degrees.

OLCA also works with employees throughout the Department to respond to written and oral inquiries from individual Members of Congress, prepare for legislative hearings, and facilitate meetings between Members of Congress and senior Department officials. With respect to congressional requests for technical assistance in legislative drafting, the Office coordinates the response to such requests with OGC's Division of Legislative Counsel. Once the response has been finalized within the Department, OLCA coordinates the response to Congress, which is sometimes conveyed in writing but also often conveyed by phone.

B. Role of Agency’s Legislative Counsel

The Division of Legislative Counsel in the OGC is headed by a career attorney, who supervises a staff of six, four of whom are attorneys. No one currently in the Division has experience working on the Hill. All of the attorneys are career staff. The Division provides technical assistance in the legislative drafting process through comments and open-ended questions. Much of this feedback occurs over the phone or by email. They help coordinate the feedback process to ensure that staff members throughout the Department with knowledge of affected programs have an opportunity to comment. From time to time, the Division reminds Department staff about how the technical assistance process works, and how it differs from the substantive drafting that requires OMB clearance per Circular A-19. In addition to technical assistance, the Division also monitors appropriations bills for other agencies to be aware of any impact on the Department’s programs and functions.

C. Role of Agency’s Policy, Regulatory, and Other Personnel

The Division of Legislative Counsel is not the regulatory division of the OGC. Instead, OGC includes a separate Division of Regulatory Services (DRS), which implements the Department’s statutory mandates via rulemaking and oversees the production and clearance of Federal Register documents and various “guidance” documents. DRS seldom plays a role in providing technical assistance in legislative drafting. The Department’s policy and program experts, however, do play a critical role in providing that assistance, and the Division of Legislative Counsel and Office of Legislation and Congressional Affairs both make sure that the Department’s experts are involved through the technical assistance process.

D. Role of Office of Management and Budget

Typically, Congress asks for assistance and that is how the Department of Education gets involved. If the advice is “technical”—that is, it does not formally state the Department’s official views on the merits of proposed legislation—the Department provides the technical assistance without seeking OMB clearance. The Division of Legislative Counsel patrols the technical-substantive line for purposes of OMB involvement.

III. Technical Drafting Assistance as Part of Appropriations Process

Appropriations legislation is handled by a completely separate office: the Department’s Budget Service, which is housed within the Office of Planning, Evaluation and Policy Development. The Budget Service generally focuses on appropriations legislation specific to the Department, while OGC’s Division of Legislative Counsel keeps the Budget Service and other offices informed on appropriations legislation for other agencies that may be of interest, such as Interior’s Bureau of Indian Education, Defense’s provision of financial assistance to certain school districts, education in the District of Columbia, and STEM education programs at NASA and the NSF. The Division also

provides technical assistance on appropriations legislation, on request, particularly when it contains substantive amendments to the Department's program statutes, which can sometimes be just as extensive and significant as in traditional authorizing legislation.

IV. Effective Practices and Features Implemented at the Agency

1. *Appropriations Legislation Monitoring:* A fair amount of appropriations legislation not expressly directed at the Department of Education is nevertheless of interest to the Department, and OGC's Division of Legislative Counsel tracks such legislation and keeps the Budget Service and the rest of the Department apprised of such developments.
2. *Technical Assistance Coordination:* The Department's Office of Legislation and Congressional Affairs and OGC's Division of Legislative Counsel have distinct yet overlapping roles in responding to congressional requests for technical assistance, and their coordination efforts work well to leverage agency expertise in the legislative process.
3. *Institutional Memory:* The lawyers in the Division of Legislative Counsel have many years of combined experience, and this institutional memory is of great value to the Department when providing technical assistance in legislative drafting.

APPENDIX E: ENERGY OVERVIEW

OVERVIEW OF TECHNICAL ASSISTANCE TO CONGRESS AT THE U.S. DEPARTMENT OF ENERGY*

I. Overview of Agency

The U.S. Department of Energy was established in 1977 when President Carter signed the Department of Energy Organization Act. This Act made the Department of Energy the twelfth cabinet-level agency, and merged many of the federal energy programs that were scattered through various executive agencies. The Department's goal is to address energy, environmental, and nuclear challenges that face America through new science and technological solutions.

The Department has a wide range of programs and initiatives. This breadth of programming stems from the Department being a consolidation of federal energy programs at its creation. The Department provides research, financial incentives, and directives to help achieve energy efficiency within the United States. The Department also regulates all nuclear energy production, clean-up, and control. Further, the Department encourages the use and production of renewable energy through different incentive programs.¹

II. Agency Process for Providing Technical Assistance for Legislative Drafting

The process of providing technical assistance in legislative drafting at the Department of Energy is a relatively informal one. Typically, a staffer from a congressional committee or member's office will reach out to the Department by phone or email to request assistance with draft legislation. Such congressional communications typically go through the Department's Office of Congressional and Intergovernmental Affairs (Congressional Affairs), which serves as the Department's formal liaison to Congress.

Such requests for technical assistance will then be passed on to the Office of the Assistant General Counsel for Legislation, Regulation, and Energy Efficiency (AGC Office) within the Office of the General Counsel. The AGC Office then identifies the relevant agency policy, program, and legal staff to assist in responding to the technical assistance request, coordinates and finalizes all responses to congressional requests for technical assistance in legislative drafting, and ensures adherence to the technical-substantive distinction for purposes of OMB Circular A-19.

Once the response to the technical assistance request is finalized, Congressional Affairs then communicates that response to the congressional requester. Oftentimes the response consists of a

* This overview draws on interviews and communications with various officials at the U.S. Department of Energy as well as from publicly available information. Thanks are due to Aaron Stevenson (The Ohio State University Moritz College of Law Class of 2017) for spearheading the research for and drafting of this overview.

¹ For more on the Department of Energy, visit <http://www.energy.gov/mission>.

written document with general comments or an actual redline of the proposed legislation. Many times the Department also conveys the response through a conference call with the relevant agency personnel.

A. Role of Agency's Congressional Affairs Staff

The Office of Congressional and Intergovernmental Affairs (Congressional Affairs) serves as the Department's formal liaison to Congress and is the gatekeeper for all Congress-agency communication. Other offices of the Department do not generally work with or contact staffers on the Hill without the involvement of Congressional Affairs. There are approximately seven officials in the Office, many of whom are political appointees with extensive experience working in Congress, and some of whom have law degrees. Congressional Affairs handles both legislative activity and all intergovernmental relations responsibilities.

Congressional Affairs, however, rarely drafts legislative material. Rather, it serves as the go-between with Congress and the Department. The Office typically provides the questions they receive through the AGC Office. This OGC office is made up of career employees and has six attorneys either entirely or partially dedicated to the handling of legislative matters. Although the AGC Office normally collects and compiles the technical assistance information from different offices throughout the Department, Congressional Affairs will review and comment on technical assistance responses they receive before determining the appropriate means to transmit a particular response to the congressional requester.

Sometimes, however, the Congressional Affairs will work directly with the office that has the necessary expertise and information to respond to a particular request. In all events, Congressional Affairs typically assists only in retrieving the information, and rarely does the actual legislative drafting—the main exception to this is the drafting of legislative testimony.

B. Role of Agency's Legislative Counsel

The Office of the Assistant General Counsel for Legislation, Regulation, and Energy Efficiency (AGC Office) is situated within the Office of the General Counsel and consists of approximately twenty employees. About six of these are attorneys who work specifically on legislative matters, including technical assistance requests; the two others are career employees who work specifically with the clearance of Departmental testimony and questions for the record (QFRs) submitted to the Department by Congress following a hearing. Four of the six attorneys worked in Congress prior to joining the Department. However, all employees within the Office can assist with legislative work, including technical assistance requests within their respective areas of expertise (in particular, energy efficiency matters).

The AGC Office works closely with Congressional Affairs on varying legislative issues. There are four subsets of work that the office performs. The first is drafting legislative proposals. The second is technical assistance. The third is the drafting of legislative testimony. The fourth is the

response to QFRs. The employees within the AGC Office do not specialize in these enumerated types of legislative work. However, the employees are specialized by subject matter area, and each employee typically covers several issues that are regulated by or of interest to the Department (i.e., energy efficiency/renewables, fossil energy, nuclear energy, personnel issues).

The AGC Office provides drafting and technical assistance to Congressional Affairs when asked, and it coordinates the outreach to policy and program staff throughout the Department who lend their expertise to respond to the technical assistance request. In the AGC Office, the legislative and regulatory counsel of the Department are in the same office and are, in some cases, the same people. This often makes the drafting process much easier and more efficient because the legislative and regulatory counsel can provide input on issues that may impact the subsequent drafting of implementing regulations, and their background knowledge of legislation is helpful. Further, the office that handles the enforcement of regulations within the Department (particularly the Department's energy efficiency regulations) provides input when the legislative drafting involves the enforcement process. When the enforcement attorneys are involved in the process, they provide input to the AGC Office for inclusion in the response transmitted to Congressional Affairs. The turnover rate with the attorneys in the AGC Office, which leads to increased efficiency and production due to the development of institutional knowledge.

C. Role of Agency's Policy, Regulatory, and Other Personnel

Due to the Department's combination of the regulatory and legislative counsel functions within the same AGC Office, the regulatory counsel perform work that complements the work done by the legislative counsel. The regulatory counsel are thus much more involved when the legislative matter at hand deals specifically with regulation.

Similarly, the policy and program experts throughout the Department are heavily involved in responding to congressional requests for technical assistance in legislative drafting. The AGC Office keeps a contact list of agency experts who serve as primary points of contact to the various programs within the Department, and the AGC Office utilizes this list to make sure that the appropriate agency personnel are involved in the technical assistance response. The AGC Office remains the primary coordinator during this process until the response is finalized, at which time Congressional Affairs conveys the Department's response to the congressional requester.

D. Role of Office of Management and Budget

The role of the Office of Management and Budget (OMB) in the agency's legislative assistance activities can be a potential gray area within the Department. OMB is involved in substantive policy comments on proposed legislation, not technical assistance in legislative drafting. The AGC Office ensures adherence to this technical-substantive distinction and ensures compliance with OMB Circular A-19. The Office also ensures that any written response to a technical assistance request

contains the disclaimer that the response does not represent the position of the Department or the Administration.

III. Technical Drafting Assistance as Part of Appropriations Process

The appropriations drafting process is completely different from the other legislative matters dealt with by the Department. The process runs through the Office of the Chief Financial Officer, and then proceeds to a small number of attorneys who work in the General Law Office within the Office of the General Counsel. These attorneys handle all appropriations matters. Of these, there is one “appropriations expert” who has been with the Department for a lengthy period of time. This employee’s institutional knowledge helps the process run smoothly. When these attorneys deal with the appropriations matter, it is then passed on to the CFO’s Office, and then back to the Hill. The AGC Office generally is not involved in the review or provision of technical assistance with respect to appropriations legislation.

IV. Effective Practices and Features Implemented at the Agency

1. *Integrated Legislation and Regulation Office*: Unlike most other agencies, the Department has integrated the legislation and regulation counsel functions within the Office of General Counsel, which leverages the Department’s regulatory expertise in providing technical assistance in the legislative process and vice versa.
2. *Centralized Legislative Counsel Office*: Unlike some other agencies, all requests for technical assistance in legislative drafting are handled and coordinated by one office in the Department’s Office of General Counsel—the AGC Office. This ensures consistency and coordination across technical assistance requests and allowed the Department to better leverage its expertise.
3. *Hill Experience*: Four of the six officials in the AGC Office worked in Congress prior to joining the office. This Hill experience is a tremendous resource when providing technical assistance in legislative drafting.

APPENDIX F: FEDERAL RESERVE OVERVIEW

OVERVIEW OF TECHNICAL ASSISTANCE TO CONGRESS AT THE FEDERAL RESERVE SYSTEM*

I. Overview of Agency

Established in 1913 as the central bank of the United States, the Federal Reserve System's role in banking and the economy more generally has evolved to cover four main areas: conducting the Nation's monetary policy; supervising and regulating banking organizations; maintaining the stability of the Nation's financial system; and providing financial services such as operating the Nation's payment systems. The Federal Reserve System is composed of the Board of Governors of the Federal Reserve System—an independent federal agency—and twelve regional Federal Reserve Banks. It also includes the Federal Open Market Committee which consists of twelve members—the seven members of the Board of Governors of the Federal Reserve System (the Board); the president of the Federal Reserve Bank of New York; and four of the remaining eleven Reserve Bank presidents, who serve one-year terms on a rotating basis.¹ The Board is composed of seven members, who are appointed by the President and confirmed by the Senate for fourteen-year terms. The Chair and Vice-Chair also are appointed by the President and confirmed by the Senate for four-year terms in those positions and are separately confirmed as governors.

The Board of Governors of the Federal Reserve System employs approximately 2,600 personnel in their Washington, D.C., office, including economists, researchers, examiners, and lawyers. With respect to the Federal Reserve's role in the legislative process, the relevant offices are the Congressional Liaison Office and the Legal Division.

II. Agency Process for Providing Technical Assistance for Legislative Drafting

The technical assistance process typically begins at the Federal Reserve when the Congressional Liaison Office receives draft legislation from a congressional staffer from a committee or member. Upon receiving the proposed legislation, the Congressional Liaison Office identifies the relevant subject-matter experts within the Federal Reserve and then distributes the congressional request to that small group of experts as well as to the appropriate attorneys within the Federal Reserve's Legal Division.

The Federal Reserve's Congressional Liaison Office facilitates effective communication between the Federal Reserve and Congress. Congressional requests for information are logged into an

* This overview draws on interviews and communications with various officials at the Federal Reserve System as well as from publicly available information.

¹ For more information on the Federal Reserve System, see BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *THE FEDERAL RESERVE SYSTEM: PURPOSES AND FUNCTIONS* (9th ed. 2005), <http://www.federalreserve.gov/pf/pf.htm>.

electronic correspondence control system that tracks the process for assigning the request to the appropriate Board division for analysis and for preparing a draft response by a senior policy official. The draft response is reviewed by an officer in the Congressional Liaison Office and prepared for review and editing by the responding Board member, typically the Chairman.

The Congressional Liaison Office then coordinates and collects the comments from the policy experts, economists, and Legal Division lawyers. These comments are generally technical in nature, but they can be more substantive if the Board has taken a public position on the underlying substance of the proposed legislation. When appropriate, the Federal Reserve consults with the Treasury Department and other financial regulators. Oftentimes, the official response consists of a phone conversation or in-person meeting, but written responses are not unusual. When written, the feedback tends to be more general comments, but sometimes it can result in an actual markup of the proposed legislation.

The Congressional Liaison Office also assists Congress in legislative drafting through congressional briefings, background discussions, and other education and awareness efforts about the research being conducted by the Federal Reserve's economists and policy analysts that may assist Congress in its legislative initiatives.

A. Role of Agency's Congressional Affairs Staff

The Congressional Liaison Office is the agency's liaison to Congress, and its mission is to maintain positive relationships between the Federal Reserve and its oversight committees in Congress, as well as to leverage the Federal Reserve's expertise in the legislative process. The Office presently consists of six dedicated staff and two administrative assistants. Staff in the Congressional Liaison Office include a mix of former lawyers, former congressional staffers, and former officials at other agencies.

The Congressional Liaison Office serves as the coordinator and gatekeeper for congressional requests for technical assistance in legislative drafting. When the Office receives such a request, it identifies the appropriate policy experts from various offices within the Federal Reserve and the subject-matter expert attorneys from the Office of General Counsel. The Office then works with this small team to develop a response to the congressional request and helps coordinate how the Federal Reserve does respond—typically orally but also at times in writing.

B. Role of Agency's Legislative Counsel

The Legal Division consists of approximately one hundred lawyers, but there is no legislative counsel division within the Legal Division. Instead, the Legal Division has an Associate General Counsel for Legislation and Special Projects who coordinates the response of the Legal Division to requests for assistance. Lawyers have developed certain substantive expertise and work on congressional requests of technical assistance in legislative drafting that fall within their substantive areas.

C. Role of Agency’s Policy, Regulatory, and Other Personnel

As noted above, the Office of Congressional Liaison is responsible for bringing together a small group of experts to respond to a congressional technical assistance request, and the Office reaches out to the relevant experts—the policy analysts, economists, and other agency personnel. So the whole agency is involved in responding to Congress, though the Office of Congressional Liaison attempts to limit the team to a manageable number.

D. Role of Office of Management and Budget

Independent agencies such as the Federal Reserve have no formal obligation to report legislative drafting requests to the Office of Management and Budget (OMB). Nonetheless, OMB sometimes approaches the agency to ask about the legislation, especially when a variety of financial regulators are affected by it.

III. Technical Drafting Assistance as Part of Appropriations Process

The Federal Reserve receives no funding from general tax revenues, so it generally is not involved in providing technical assistance in the drafting of appropriations legislation.

IV. Effective Practices and Features Implemented at the Agency

1. *Congressional Liaison Office as Sole Voice to Congress*: By having everything from Congress go through the Congressional Liaison Office, the Federal Reserve is better able to maintain a strong and productive working relationship with Congress as well as speak with a consistent voice on the Hill.
2. *Congressional Education Efforts as Form of Technical Assistance*: Developing relationships with congressional staffers and educating them on the resources available at the Federal Reserve are critical. To leverage agency expertise, the Congressional Liaison Office does not just assist in technical drafting, but it also shares the agency’s economic and policy expertise by briefing congressional staffers on current research being conducted by economists and policy analysts at the Federal Reserve. Most interaction with Congress involves such education efforts.

APPENDIX G: HHS OVERVIEW

OVERVIEW OF TECHNICAL ASSISTANCE TO CONGRESS AT THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES*

I. Overview of Agency

The United States Department of Health and Human Services (HHS) is a cabinet-level department whose mission is to “enhance and protect the health and well-being of all Americans.”¹ The Secretary of Health and Human Services serves as the Department’s chief policy officer and general manager. The Office of the Secretary provides leadership through seventeen staff offices that oversee operations, provide guidance, and ensure laws are followed fairly. The Department’s programs are administered through eleven operating divisions (eight public health agencies and three human services agencies) in coordination with ten HHS regional offices.

Three staff offices—the Office of the Assistant Secretary for Financial Resources (ASFR), the Office of the Assistant Secretary for Legislation (ASL), and the Office of the General Counsel (OGC)—participate in the process of assisting Members of Congress with technical drafting for HHS-related bills. The Assistant Secretaries and General Counsel are appointed by the President with the advice and consent of the Senate. With the exception of a handful of Schedule-C excepted appointees, most of the staffers in these offices are career-appointed civil servants.

II. Agency Process for Providing Technical Assistance for Legislative Drafting

The process for providing technical assistance with legislative drafting begins when a staffer from a committee of jurisdiction or a Member’s personal office requests the Department’s help. The Office of the Assistant Secretary for Legislation (ASL), which serves as the primary link between the Department and Congress, is the official point of contact for technical drafting assistance requests for legislation other than appropriations. (In HHS, lead responsibility for appropriations legislation is in the Office of the Assistant Secretary for Financial Resources.) Many ASL staffers have prior experience working for Members of Congress. Though some ASL staffers have law degrees, the vast majority of the Department’s legal advisors, including its legislative drafting attorneys, are part of the Department’s Office of the General Counsel.

The ASL serves as both the gatekeeper and the coordinator of requests for drafting assistance. When a request for assistance with legislative drafting is received, the ASL may accept or refuse the request at its discretion—though it almost always chooses to provide assistance regardless whether the request comes from the majority or minority party in Congress or whether it comes from a Member of the President’s party. If the ASL chooses to provide assistance, the legislation is directed

* This overview draws on interviews and communications with various officials at the U.S. Department of Health and Human Services as well as from publicly available information. Thanks are due to Logan Payne (University of Virginia Law School Class of 2016) for spearheading the research for and drafting of this overview.

¹ For more information, visit <http://www.hhs.gov/about/index.html>.

to the Office of the Deputy Assistant Secretary for Legislation responsible for the bill's subject matter (i.e., discretionary health programs, mandatory health programs, or human services). Staffers in that office identify and contact stakeholders throughout the operating divisions whose missions would be affected by the proposed legislation. Using feedback from these stakeholders, the ASL staff flags any potential problems with the legislation and sends it to the Office of the General Counsel.

The Office of the General Counsel is the Department's legal team and provides legal services to the Secretary, senior departmental officials, and the Department's agencies and operating divisions. The team of over 400 attorneys and support staff is grouped into eight divisions grouped by practice area (e.g., civil rights, ethics, food and drug, etc.) Because of the Department's size and the scope of its responsibilities, one of these eight divisions is dedicated solely to Legislation.

The OGC's Legislation Division provides legislative legal services for the full range of HHS agencies and programs, but each of its staff attorneys is assigned a portfolio of programs for which they are primarily responsible. These responsibilities include legislative drafting, providing legislative legal advice to HHS components, and giving legal support and representations for those components in negotiations within the Executive Branch and with Congress on legislative and congressional oversight matters. With respect to legislative drafting, their goal is to articulate the policy ideas embodied in the proposed legislation using precise legal language to remove any unintended ambiguity or conflict with existing statutes or regulations.

In most cases, the proposed legislation has already been drafted by staffers for a congressional committee or Member, and the request is simply fine-tuning language or identifying any unforeseen, undesired consequences. On rare occasions, however, a Member of Congress will approach HHS and ask for its attorneys to draft legislation to achieve an intended result based only on an outline of the policy framework. Provided that the agency is not stating its views on the merits of the proposed legislation, this type of request still falls within the category of "technical" drafting and is therefore exempt from the OMB clearance requirement imposed by Circular A-19.

When the drafting is complete, the OGC and/or ASL distribute the draft to appropriate components of the Department for review. After review (and any necessary revision), the ASL returns the legislation to the Member or staffer who requested the assistance. The format of the technical assistance can vary from general comments on the legislation to specific suggested language changes—and even redlining of the draft legislation or additional drafting when requested or otherwise warranted. While technical assistance typically results in a formal, written response from the agency, there are often informal communications—phone calls or meetings—that also take place as part of the process.

A. Role of Agency's Congressional Affairs Staff

The Office of the Assistant Secretary for Legislation (ASL) is the primary link between the Department and Congress for legislation other than appropriations. (In HHS, lead responsibility for

appropriations legislation is in the Office of the Assistant Secretary for Financial Resources.) The Assistant Secretary is appointed by the President with the advice and consent of the Senate—and the three Deputy Assistant Secretaries are political appointees—but most of the rest of the ASL staff are career civil servants with about forty total staffers in the office. Many ASL staffers have prior experience working for Members of Congress, and some also have law degrees—though attorneys in the Office of the General Counsel’s Legislation Division are responsible for the actual drafting assistance.

The ASL serves as both the gatekeeper and coordinator of requests for drafting assistance. In theory, ASL is the official point of contact for all requests for assistance with legislation relevant to the Department’s mission, but in practice, many requests bypass the Department level and go directly to the program agency (i.e. the Food and Drug Administration, Centers for Disease Control and Prevention, etc.). It is understood within the agency that the program agency should loop in ASL of such requests. When a request for assistance with legislative drafting is received, the ASL may accept or refuse the request at its discretion—though, as noted above, it almost always chooses to provide assistance.

If the ASL chooses to provide assistance, the legislation is directed to the Office of the Deputy Assistant Secretary for Legislation responsible for the bill’s subject matter (i.e., discretionary health programs, mandatory health programs, or human services). Staffers in that office identify and contact stakeholders throughout the operating divisions whose missions would be affected by the proposed legislation. Using feedback from these stakeholders, the ASL staff flags any potential problems with the legislation and sends it to the Office of the General Counsel. When the drafting is complete, the ASL and other appropriate Department offices review it, and ASL returns it to the Member or staffer who made the request.

B. Role of Agency’s Legislative Counsel

The Office of the General Counsel (OGC) is the legal advisor to the Secretary, senior departmental officials, and the Department’s agencies and operating divisions. The OGC’s 400 attorneys are organized into eight divisions, one of which is dedicated solely to Legislation.

The Legislation Division provides legislative legal services for the full range of HHS agencies and programs. The Legislation Division is headed by an Associate General Counsel and presently staffed with five additional attorneys and other non-lawyer staffers. The division’s five staff attorneys are assigned responsibility for portfolio of programs, but in contrast to how some other agencies are organized, HHS legislation attorneys are not formally embedded within those programs. Moreover, unlike the ASL staff, none of the Legislation Division attorneys has previously worked on the Hill. In addition to drafting legislation, the Legislation Division provides legislative legal advice to HHS components and represents the Department in negotiations within the Executive Branch and with Congress on legislative and Congressional oversight matters.

The Legislation Division typically becomes involved in the technical assistance process once ASL has collected input from policy stakeholders throughout the Department's offices and operating divisions. ASL uses this feedback to flag potential problem areas and sends the proposed legislation to the Legislation Division attorney responsible for the bill's subject matter.

In most cases, the OGC receives a complete bill drafted by a staffer for a congressional committee or Member. The HHS drafting attorney generally refines the legal language to resolve any conflicts with existing statutes or regulations and eliminate any unintentional ambiguity. The HHS legislative counsel's involvement may actually be quite substantial. Technical assistance on a bill is by no means limited to supplying actual draft bill language. It normally includes supplying comments on how the bill (as drafted) would affect the agency's programs, whether the bill would pose administrative difficulties, and whether aspects of the bill are ambiguous. The Legislative Counsel's involvement can include identifying such issues, revising program offices' attempts to identify such issues, and advising whether issues identified by program offices can be included in the response to the Hill without having to obtain OMB clearance.

Occasionally, however, a Member of Congress will approach HHS and ask for its attorneys to also draft a legislative provision to achieve an intended result based only on an outline of the policy framework. If the ASL elects to accept such a request, the drafting attorney will fulfill it. HHS considers such products also to be "technical" for purposes of OMB Circular A-19 as long as the agency is not stating its views on the merits of the proposed bill.

C. Role of Agency's Policy, Regulatory, and Other Personnel

The policy and regulatory operations of the Department of Health and Human Services are not concentrated into a single centralized office or division within the Office of the Secretary. The Department is divided into eleven operating divisions, each of which contains a number of agencies, offices, institutes, centers, services, and/or commissions. The Office of the Assistant Secretary for Legislation collects comments from stakeholders within these agencies, including policy personnel, before submitting the request for technical drafting assistance to the Office of the General Counsel. There is no official role for the regulatory staff within the Department to participate in the legislative assistance process, but they are sometimes looped into the process when deemed appropriate by ASL or OGC Legislation Division.

D. Role of Office of Management and Budget

The Office of Management and Budget (OMB) plays no role in technical assistance and only becomes involved if the Department states its views on the merits of the legislation. Pursuant to OMB Circular A-19, any agency views on the merits of proposed legislation must be cleared by OMB. When necessary, such "views letters" are drafted by a program office, reviewed and revised by the Office of the General Counsel, reviewed by other appropriate Department offices (including ASL), and submitted to OMB for such clearance. If the advice is "technical"—that is, it does not

state the agency's views on the merits of proposed legislation—the agency may provide the advice without seeking OMB clearance. Both ASL and OGC Legislation Division patrol the technical-substantive line for purposes of OMB involvement.

III. Technical Drafting Assistance as Part of Appropriations Process

The technical drafting assistance process for appropriations legislation is generally the same as the process for authorizing legislation, except it goes through a different channel within the Department. When the legislation is part of the appropriations process, the Office of the Assistant Secretary for Financial Resources (ASFR) serves as the gatekeeper and coordinator instead of the ASL. When the request is received, ASFR collects input from stakeholders throughout the Department and coordinates the fulfillment of the request. If there are substantive provisions in the draft appropriations legislation, the OGC Legislation Division reviews and revises the language as necessary, and once complete, the proposed bill language is returned to the committee via the ASFR.

IV. Effective Practices and Features Implemented at the Agency

1. *Office of the Assistant Secretary for Legislation (ASL)*: ASL does a terrific job of identifying the key stakeholders in the program areas across the Department who could be helpful in providing technical assistance on a particular piece of draft legislation, and it also serves as an important and effective gatekeeper with Congress.
2. *Office of the General Counsel Legislation Division*: Having a centralized legislation division within the General Counsel's Office dedicated to providing legislative counsel and assistance helps to leverage the Department's legislative expertise and institutional memory while still getting the substantive expertise of the various program areas when providing technical assistance. Moreover, having a dedicated Legislation Division promotes expertise in the technicalities and skills of legislative drafting, and familiarity with the legislative process and helps maintain close relationships with the primary department components involved in the legislative process (ASL and ASFR).
3. *Division Between Legislation Division and ASL (or ASFR, as applicable)*: Having ASL (or, for appropriations bills, ASFR) deal directly with Congress—and the politics that may be implicated when dealing with Congress—allows the OGC Legislation Division (and the rest of the Department) to maintain its role as an expert, nonpolitical counselor on legislative drafting.

APPENDIX H: HOMELAND SECURITY OVERVIEW

OVERVIEW OF TECHNICAL ASSISTANCE TO CONGRESS AT THE U.S. DEPARTMENT OF HOMELAND SECURITY*

I. Overview of Agency

The U.S. Department of Homeland Security (DHS) was formed in response to the September 11, 2001 terrorist attacks. Its establishment in 2002 combined twenty-two agencies into a single cabinet-level agency. Its mission is to maintain the safety and security of the country, and its jurisdiction extends to transportation security, border security, emergency response, cybersecurity, chemical facility inspections, and more.¹

The United States Coast Guard (USCG), a military service and a branch of the armed services of the United States, operates as a service in DHS, except when operating as a service in the Navy. The genesis of the Coast Guard was the United States Revenue Cutter Service, established in 1790, to serve as an armed customs enforcement service. Since then, through the consolidation of other services and mission assignments, the Coast Guard's jurisdiction has expanded to encompass a total of eleven statutory missions, with activities ranging from law enforcement (in both domestic and international waters), marine safety regulation, and military service.²

II. Agency Process for Providing Technical Assistance for Legislative Drafting

Staff members on a congressional committee or in a Member's office may request technical assistance from DHS or any of its components. The Office of Legislative Affairs (OLA) is situated within the Office of the Secretary, and serves as the primary liaison to Members of Congress and their staffs, the White House and Executive Branch, and to other federal agencies and governmental entities with roles in ensuring national security.³

The OLA sends technical assistance requests to the General Counsel's Legal Counsel Division (LCD). The LCD provides legal review, guidance, and support on significant litigation matters. They are also experts on DHS's statutory authority, and analyze existing powers and assess the impact of pending legislation. LCD also provides legal support on privacy and civil rights and civil liberties

* This overview draws on interviews and communications from various officials at the U.S. Department of Homeland Security and U.S. Coast Guard as well as from publicly available information. Thanks are due to Ally Chiu (Harvard Law School Class of 2017) for spearheading the research for and drafting of this overview.

¹ For more information on DHS's mission and organization, visit <http://www.dhs.gov/>.

² For more information on USCG's mission and organization, visit <http://www.uscg.mil/>.

³ To view the DHS Office of Legislative Affairs' organizational chart, visit <http://www.dhs.gov/sites/default/files/publications/org-chart-leg-affairs.pdf>.

issues, and responds to significant inquiries from Congress and the U.S. Government Accountability Office.⁴

Within the LCD, an Assistant General Counsel for Legislative Affairs and three staff attorneys specialize in responding to requests from Congress, including technical assistance requests. Currently, none of them have experience working on Capitol Hill, but some previous employees had such experience. Technical assistance requests may become quite involved, and may involve the drafting of entire portions of bills. Oftentimes congressional requests for technical assistance are made directly to the agency components, and the agencies are directed to keep DHS Headquarters—OLA and OGC—in the loop about any technical assistance they may be providing. To help coordinate technical assistance efforts and other interactions with Congress, DHS Headquarters has issued a helpful Legislative Procedures Management Directive. With respect to technical assistance or “informal comments,” the Directive instructs:

Where Congressional members or their staff request DHS views regarding Draft Legislation, DHS, in certain instances, may provide informal comments prior to completion of formal OMB clearance. The extent to which informal comments can be provided depends upon a number of factors, including, but not limited to, the policy content and format of the informal comments, as well as the political interest and procedural maturity of the legislation in question. In all cases, Legislative Affairs and DHS Organizational Elements shall coordinate informal comments with any significantly affected DHS Organizational Element, as well as COS, OGC, and CFO, as appropriate. In communicating with the Congress, Legislative Affairs shall advise the Congress that informal comments remain subject to formal Administration review and approval.⁵

In practice, sometimes the notice from component agencies is received concurrently or after the fact, but coordination is critical.

A. Role of Agency’s Congressional Affairs Staff

The Office of Legislative Affairs (OLA) is headed by an Assistant Secretary, and supported by two Deputy Assistant Secretaries, one for each house in Congress, and a Chief of Staff. The various DHS components are divided up among eight directors.⁶ Components have their own offices that handle relations with Congress; they report to their respective director. OLA, however, is responsible for coordinating the overall legislative strategy of the Department. In total, the DHS headquarters’ office has twenty to thirty staff members that comprise a mix of career staff and political appointees. Nearly all of the political appointees within the office have experience on

⁴ For a description of the divisions within DHS’s Office of the General Counsel, visit <http://www.dhs.gov/office-general-counsel>.

⁵ Dep’t of Homeland Security, Legislative Procedures Management Directive, MD No. 0420, at 14 (Feb. 28, 2005) [hereinafter DHS Management Directive], http://www.dhs.gov/sites/default/files/publications/mgmt_directive_0420_legislative_procedures.pdf.

⁶ To view the leadership structure of the DHS Office of Legislative Affairs, visit <http://www.dhs.gov/sites/default/files/publications/org-chart-leg-affairs.pdf>.

Capitol Hill. At the executive level, the percentage with Hill experience increases. OLA is the gatekeeper and main point of contact with communications with Congress, including responding to requests for technical assistance in legislative drafting. This role is reflected formally in the DHS Legislative Procedures Management Directive:

Legislative Affairs shall perform or direct the final transmittal to the Congress of all Draft Legislation, Legislative Reports, Legislative Comments, QFRs, Legislative Programs, and Congressional Testimony for non-appropriations related items. . . . With the approval of Legislative Affairs, and where not otherwise required by law or policy, DHS Organizational Elements may perform the final transmission of Legislative Reports.⁷

As noted, component agencies have their own legislative affairs staff. For instance, the USCG's Governmental and Public Affairs is divided into two offices: the Office of Congressional Affairs and the Office of Public Affairs.⁸ The Office of Congressional Affairs serves as USCG's liaison to Congress and is comprised of approximately ten people, including a captain, deputy, House and Senate liaisons, deputy House and Senate liaisons, among other staff. All members of this office are military personnel, and they must rotate out every two years on a staggered schedule.

B. Role of Agency's Legislative Counsel

A subsection of the Legal Counsel Division of the Office of the General Counsel handles the technical assistance requests from Congress. The General Counsel is a political appointee. Beneath the General Counsel are two Deputy General Counsels who are also political appointees and one career Principal Deputy General Counsel. There are four attorneys within the office who are dedicated to completing requests by Congress.

Each component agency has its own equivalent office that handles the drafting for technical assistance requests. For instance, The USCG's Legislative Counsel is located within their Chief Legal Office. The office is comprised of three staff attorneys and one paralegal. All members of the office are career staff. At one point, it used to be a mix of military and civilian. None have Hill experience, and one has lobbying experience.

Members of these offices operate in a strictly legal function, and technical drafting requests are considered a professional service. Many requests originate from DHS briefings or hearings, and may be sent directly to the component offices. If the USCG's Legislative Counsel receives a request that has a clear DHS departmental component offices, they will carve off that portion, draft the rest, and notify DHS headquarters.

For every assistance request fulfilled, DHS includes a disclaimer to stipulate that the subsequent result does not reflect the views of the department and does not represent the administration's position. Through their specialization, these drafters have accumulated the requisite knowledge to

⁷ DHS Management Directive, *supra* note 5, at 14.

⁸ For more information on the USCG headquarters organization, visit <http://www.uscg.mil/top/units/org.asp>.

determine which requests should go through the OMB process and which can be quickly completed. The average turnaround time for a technical assistance request is one to two weeks. An experienced drafter will be able to identify potential opposition from various parties.

C. Role of Agency's Policy, Regulatory, and Other Personnel

The legislative counsel staff that draft technical assistance requests operate independently from the regulatory staff. The Regulatory Affairs Law Division is a separate division within DHS's Office of the General Counsel, while the legislative drafters are encompassed within the Office of the General Counsel's Legal Counsel Division. As part of the technical assistance process, the legislative counsel identify the relevant program and policy folks at the various component agencies and request their feedback on the draft legislation. This is coordinated between the component agency and its legislative affairs staff and the main DHS legislative counsel and legislative affairs staff.

D. Role of Office of Management and Budget

OMB is generally not involved in technical assistance requests. Generally, technical assistance requests are distinct from substantive assistance requests in that technical assistance does not take a position on an issue. DHS Headquarters may send a request through the OMB process for assurance if the technical-substantive distinction is unclear.

III. Technical Drafting Assistance as Part of Appropriations Process

Requests related to appropriations are handled by the Office of the Chief Financial Officer (CFO). Legislative Affairs staff usually do not handle appropriations-related issues; they would be involved only where their expertise is relevant, such as in a technical drafting situation. This division of responsibility is reflected in the DHS Management Directive: "CFO shall perform the final transmittal to the Congress of all Draft Legislation, Legislative Reports, Legislative Comments, QFRs, Legislative Programs, and Congressional Testimony for all appropriations related items."⁹ The processes for appropriation and authorization may differ between DHS and its components. For instance, USCG authorizations occur relatively frequently (annually or bi-annually) and their bills tend to be more comprehensive, while other DHS bills tend to be more issue based.

IV. Effective Practices and Features Implemented at the Agency

1. *Coordination Critical:* Especially because DHS is a relatively newer department that brings together agencies from diverse backgrounds—and diverse relationships with congressional committees, staffers, etc.—it is critical that DHS Headquarters helps coordinate technical assistance in legislative drafting.

⁹ DHS Management Directive, *supra* note 5, at 14.

2. *Technical Assistance Disclaimers*: To avoid confusion on the Hill, DHS strongly advocates the use of written disclosures—that the following comments do not reflect the views of the agency, the Department, or the Administration—on all responses to requests for technical assistance.
3. *Use of Legislative Counsel in Congress*: DHS and many of its component agencies include legislative counsel from the outset in the legislation process on the Hill, with the coordination of the legislative affairs staff. This allows the technical drafters and experts early access and feedback in the legislative process.
4. *Formalized Guidance*: DHS has established formal guidance for the agency’s role in the legislative process, which assists DHS and its components in effectively providing legislative drafting assistance.

APPENDIX I: HUD OVERVIEW

OVERVIEW OF TECHNICAL ASSISTANCE TO CONGRESS AT THE U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT*

I. Overview of Agency

The U.S. Department of Housing and Urban Development (HUD) was established as a cabinet-level agency by the Department of Housing and Urban Development Act of 1965, to coordinate and administer federal programs that provide funding for housing and community development. HUD's mission is to create sustainable, inclusive communities and ensure quality, affordable homes for everyone. HUD aims to boost the economy and protect consumers by fostering a robust housing market; address the need for quality, affordable rental homes; utilize housing as a mechanism for improving life quality; and build inclusive, sustainable, and discrimination-free communities.

HUD's programs include initiatives for rental and homeownership for lower-income families, regulations to eliminate lead-based paint hazards, grants for state and local governments for urban community development, housing vouchers, and assistance to the homeless. Agencies within HUD include the Federal Housing Administration (FHA), which provides mortgage insurance on loans made by FHA-approved lenders, and the Government National Mortgage Association (Ginnie Mae), which guarantees investors the timely payment of principal and interest on mortgage-backed securities that backed by federally insured or guaranteed loans.¹

II. Agency Process for Providing Technical Assistance for Legislative Drafting

The process for providing technical assistance with legislative drafting generally begins when a staffer from a committee of jurisdiction over HUD or a Member's personal office requests HUD's drafting assistance. Requests can vary from drafting portions of bills from scratch, to making comments and edits on a congressional drafter's version of a proposed bill, to redlining the existing law to track how it might change current circumstances (Ramseyer/Cordon draft²). While technical assistance typically results in a formal, written response from HUD to the congressional requester, there are often informal communications—phone calls or meetings—that also take place as part of the process.

* This overview draws on interviews and communications from various officials at the U.S. Department of Housing and Urban Development as well as from publicly available information. Thanks are due to Ally Chiu (Harvard Law School Class of 2017) for spearheading the research for and drafting of this overview.

¹ For more information on the agency's mission and organization, visit <http://portal.hud.gov/hudportal/HUD>.

² See 4 DESCHLER'S PRECEDENTS, ch. 17, § 60 ("The Ramseyer rule provides that whenever a committee reports a bill or joint resolution repealing or amending any statute or part thereof, the committee report is to include the text of the statute or part thereof to be repealed, as well as a comparative print showing the proposed omissions and insertions by stricken through type and italics, parallel columns, or other appropriate typographical devices. The purpose of the Ramseyer rule is to inform members of any changes in existing law to occur through proposed legislation."), <http://www.gpo.gov/fdsys/pkg/GPO-HPREC-DESCHLERS-V4/html/GPO-HPREC-DESCHLERS-V4-3-7-3.htm>.

Most requests for legislative drafting assistance are sent to HUD's Office of Congressional and Intergovernmental Relations (OCIR), which coordinates within HUD to address each request. Whether a drafting request should undergo review by the Office of Management and Budget (OMB) depends on whether the assistance requested is technical or substantive in nature. OCIR is generally the only direct contact point to Congress for drafting requests. Typically, OCIR sends the request to the Office of Legislation and Regulations within HUD's Office of General Counsel. Though the office consists of two divisions—Legislation and Regulations—each staff member is trained in both legislative and regulatory drafting. The attorneys ensure that the appropriate program office staff and their program counsel are included in reviewing and providing technical assistance. Once drafting and review have been completed, OCIR then transmits the technical assistance back to the congressional requester.

A. Role of Agency's Congressional Affairs Staff

Staff in Office of Congressional and Intergovernmental Relations (OCIR) consists primarily of individuals who have worked on the Hill or have other legislative experience—and the majority of these dozen or so agency officials are political appointees. OCIR is divided into three offices: the Office of the Assistant Secretary for Congressional and Intergovernmental Relations, the Office of the Deputy Assistant Secretary for Congressional Relations, and the Office of the Deputy Assistant Secretary for Intergovernmental Relations.³ OCIR is subdivided by geographic region and is responsible for coordinating the presentation of HUD's legislative and budget program to Congress, assisting in resolving intra-departmental policy differences and differences between HUD and OMB on legislative matters, and serving as the principal contact with state and local governments and public interest groups to provide information regarding HUD's programs and initiatives.

OCIR directs and coordinates all legislative matters, except for appropriations matters (see below), regarding HUD's relationships with Congress, congressional committees, and individual members of Congress. OCIR maintains liaison with Congress, the White House, and OMB on HUD-related legislative matters. OCIR also provides advice to HUD officials on views on HUD-related legislation and recommend strategies on developing or pursuing legislation of interest to HUD.⁴

B. Role of Agency's Legislative Counsel

Situated within HUD's Office of General Counsel, the Office of Legislation and Regulations (OLR) consists of approximately eleven lawyers, four of whom are manager-level and two of whom have previously worked on the Hill. OLR staffs four attorneys in the Legislation Division and six in

³ To view HUD's Congressional and Intergovernmental Relations Staff Directory, visit http://portal.hud.gov/hudportal/HUD?src=/program_offices/gov_relations/dircir.

⁴ See Dep't of Housing & Urban Dev., Delegation of Authority for the Office of Congressional and Intergovernmental Affairs, 76 Fed. Reg. 62,594 (Oct. 7, 2011).

the Regulations Division. Because the regulatory work is more steady and legislative work more sporadic, but more intense when it occurs, everyone in OLR is trained in both areas.

OLR provides legislative and regulatory drafting, statutory and regulatory legal analysis, and other legal services to HUD program offices in connection with the development, preparation, and presentation of the Department's legislative and regulatory programs. The Legislation Division attorneys coordinate HUD's policy position on legislation originating in the Executive Branch or in Congress, attend and monitor congressional hearings that affect HUD, and provide technical drafting services, legal review, and other technical assistance, as requested by members of Congress. The Regulations Division attorneys develop, draft, and clear HUD's regulations, notices of policy statements, and other Federal Register or publicly issued policy documents. They also advise on the rulemaking process and authorities, such as executive orders that may impact rulemakings, and address questions arising from related regulations in program operations. And they coordinate HUD policy positions on other agencies' regulations and government-wide policy statements and circulars that affect HUD. The attorneys determine when regulatory materials are needed to implement new statutory authority and when rulemaking is required.⁵

With respect to technical assistance in legislative drafting, the form of the assistance can vary, from providing general comments on the proposed legislation, to drafting all or portions of the desired legislation based on legislative specifications provided by the congressional requester, to editing the draft version, or providing Ramseyer/Cordon drafts. When drafting, the legislative staff will customarily consult with the program team to check policy.

C. Role of Agency's Policy, Regulatory, and Other Personnel

HUD is somewhat unique in that, within OGC, regulatory and legislative counsel are situated within the same office—the Office of Legislation and Regulations, and while attorneys specialize in one or the other tasks, they are also trained in both areas and both play a role in providing technical assistance in legislative drafting. The Office, in coordination with OCIR, also coordinates these technical assistance efforts from program experts throughout the Department.

D. Role of Office of Management and Budget

The Office of Management and Budget (OMB) generally plays no role in technical drafting assistance and only becomes involved if HUD states its views on the merits of the legislation. Pursuant to OMB Circular A-19, any agency views on the merits of proposed legislation must be cleared by OMB. When necessary, “views letters” are drafted by the Office of General Counsel for submission to OMB. If the advice is “technical”—that is, it does not state the agency's views on the merits of proposed legislation—the agency may provide the advice without seeking OMB clearance. Both OCIR and OLR patrol the technical-substantive line for purposes of OMB involvement.

⁵ For a more comprehensive description of the various offices within HUD's Office of General Counsel, visit http://portal.hud.gov/hudportal/documents/huddoc?id=Legal_Honors_Booklet_2016.pdf.

III. Technical Drafting Assistance as Part of Appropriations Process

Requests related to appropriations are channeled through HUD's Office of the Chief Financial Officer (CFO) as opposed to HUD's Office of Congressional and Intergovernmental Relations (OCIR), though the CFO and OCIR coordinate such efforts. CFO staff functions include accounting, budget, and financial management. Additionally, the CFO's office manages financial systems that process millions of transactions annually to support HUD projects and meet the needs of the housing community.⁶ When request relating to appropriations implicate issues related to authorizing legislation that may require technical assistance in drafting, OLR is generally involved and provides assistance in similar fashion as discussed above with respect to assistance requests channeled through OCIR. The appropriations technical assistance process, however, tends to be more streamlined due to the time and information sensitive nature of appropriations.

IV. Effective Practices and Features Implemented at the Agency

1. *Integrated Legislation and Regulations Office*: Unlike most other agencies, HUD has one combined office within the General Counsel's Office that handles both legislation and regulation. This provides better coordination and technical expertise between the Department's regulatory efforts and its assistance to Congress on its legislative efforts.
2. *OCIR/OGC Divide*: Having OCIR deal directly with Congress—and the politics that may be implicated when dealing with Congress—preserves the OGC Office of Legislation and Regulations (and the rest of the Department) as an expert, nonpolitical counselor on legislative drafting. There is a “disciplined process” of intra-agency oversight by the OCIR and the CFO.
3. *Ramseyer/Cordon Technical Assistance*: It used to be customary for Congress to provide a Ramseyer/Cordon draft (redline of how proposed legislation affects current law) with its proposed legislation, but that seems to no longer be the case. So the Office of Legislation and Regulations routinely creates Ramseyer/Cordon drafts for internal use and as technical assistance to the congressional requester.
4. *Details on the Hill*: Two of the attorneys in the Office of Legislation and Regulations have worked on the Hill, and the Office has found that experience to be very valuable. One of the office's former attorneys did a detail on the Hill through the Brookings Institute's Legis Congressional Fellowship, and this experience was also very helpful.⁷

⁶ For more information on HUD's Office of the Chief Financial Officer, visit http://portal.hud.gov/hudportal/HUD?src=/program_offices/cfo.

⁷ For more information on the Legis Fellowship, visit <http://www.brookings.edu/about/execed/legis-fellowship>.

APPENDIX J: LABOR OVERVIEW

[PENDING AGENCY REVIEW AND APPROVAL]

APPENDIX K: PBGC OVERVIEW

OVERVIEW OF TECHNICAL ASSISTANCE TO CONGRESS AT PENSION BENEFIT GUARANTY CORPORATION*

I. Overview of Agency

The Pension Benefit Guaranty Corporation (PBGC) is a wholly owned government corporation that administers and enforces Title IV of the Employee Retirement Income Security Act (ERISA).¹ The PBGC shares ERISA administration and enforcement responsibilities with the Department of Labor and the Department of the Treasury (particularly the Internal Revenue Service). The Secretaries of these Departments occupy two of the three seats on the PBGC's Board of Directors, and the Secretary of Labor serves as the Board's chair. The third seat is occupied by the Secretary of Commerce.

The Board of Directors establishes and oversees the PBGC's general policies. From the agency's creation in 1974 to the passage of the Pension Protection Act of 2006, the Chair appointed the PBGC's Executive Director; since 2006, the Director of the PBGC has been appointed by the President with the advice and consent of the Senate. The Director is responsible for managing the PBGC's personnel, organization, and budget and oversees eight operating divisions. These divisions are headed by eight senior executives and staffed by career civil servants. Two of these divisions, the Office of the General Counsel (OGC) and the Office of Policy and External Affairs (OPEA), work together to fulfill requests for technical assistance with legislative drafting and/or modeling and forecasting, with the assistance of experts from other PBGC offices as needed.

II. Agency Process for Providing Technical Assistance for Legislative Drafting

Contacts with Congress are managed by the Office of Policy and External Affairs (OPEA). The Office of the General Counsel (OGC) serves as the gatekeeper of all requests for drafting assistance that are not solely requests for modeling and forecasting. When the request is received, OPEA consults with OGC to determine if the request is technical or policy oriented; if the former, technical assistance is almost always provided. OGC determines whether the request triggers the OMB Circular A-19's clearance requirements. Requests for the types of assistance that would trigger these requirements (i.e., substantive drafting assistance or requests for specimen bills) are extremely uncommon, but OGC will often give the OMB an informal notice as a courtesy whenever it provides any type of assistance with legislative drafting. As the General Counsel is Secretary to the Board, OGC also determines if the request raises policy issues that should be brought to the Board's attention under PBGC's bylaws.

* This overview draws on interviews and communications from various officials at the Pension Benefit Guaranty Corporation as well as from publicly available information. Thanks are due to Logan Payne (University of Virginia Law School Class of 2016) for spearheading the research for and drafting of this overview.

¹ For more information on the PBGC, visit www.pbgc.gov.

The typical type of request the PBGC receives is a request to determine whether the proposed legislation achieves its intended results. Similar to other agencies, congressional staffers will approach the PBGC to see if the language conflicts with any existing statutes or results in any unforeseen, consequences. But where other agencies often must rely on experience and institutional knowledge to forecast outcomes, the PBGC can provide Congress with sophisticated modeling and forecasting using its Pension Insurance Modeling System (PIMS).²

When a request involves modeling, the Chief Policy Officer sends the modeling component to the Policy, Research, and Analysis Department (PRAD) within the Office of Policy and External Affairs (OPEA). PRAD's actuaries and economists then simulate the effects of the legislative changes and compile a report, which is sent up the chain of command to the PBGC's Chief Policy Officer. If necessary, the Chief Policy Officer will work with the OGC to refine the language of the proposed legislation to achieve the desired policy effect.

Requests for purely technical drafting assistance (i.e., no modeling required) are perhaps less common at the PBGC than at many other agencies due to the PBGC's narrow ERISA responsibility. Members of Congress have a number of other, much larger expert agencies from which they can request technical drafting assistance with ERISA legislation, including the Departments of Labor and the Treasury. However, these larger agencies do not have the PBGC's advanced modeling capabilities, which is why so many of the requests to PBGC involve some form of modeling.

If only legislative drafting assistance is involved, and no modeling is necessary, the request is sent to one of OGC's four or five attorneys that help draft legislation, who will involve attorneys from PBGC's Office of Chief Counsel (OCC) if it involves areas within their expertise. These attorneys also coordinate with policymakers in OPEA. Once complete, OGC will attach disclaimer to the final product stating that it does not reflect the official policy of the agency or the administration and return it to the office of the Member or committee that made the request. Throughout the process, all communications between the PBGC and external stakeholders related to legislative drafting are directed through Chief Policy Officer and OGC. This policy ensures that the agency meets any expectations of confidentiality held by any requesting party that may want to keep the legislation private for strategic reasons.

A. Role of Agency's Congressional Affairs Staff

The PBGC's policy and legislative affairs personnel are part of the Office of Policy and External Affairs (OPEA). The OPEA, led by the Chief Policy Officer, oversees and directs interactions with Congress and Executive Branch agencies and manages the analysis, review, and drafting of legislative and other policy proposals. The OPEA has two component departments, the Office of

² For more information on the PIMS, visit <http://www.pbgc.gov/about/projections-report/pension-insurance-modeling-system.html>.

Communications, Outreach and Legislative Affairs (COLA), and the Policy Research and Analysis Department (PRAD).

COLA fills the typical “congressional affairs” role within the agency, but not that office’s typical function in the technical drafting assistance process. COLA coordinates PBGC’s interactions with the press and various stakeholders including organizations that represent pension plan participants, pension practitioners/administrators, plan sponsors, and Congress. At PBGC, however, the Office of General Counsel serves as the gatekeeper for legislative drafting requests, through the Office of Legal Policy, whose principal client is OPEA. The actual functions of a typical congressional affairs staff with respect to technical drafting assistance are mostly performed by either the Office of General Counsel or the OPEA’s departmental component, PRAD. The OGC serves as the gatekeeper of drafting requests, and OPEA and PRAD provide policy expertise and financial modeling and forecasting services when requested.

B. Role of Agency’s Legislative Counsel

PBGC employs about one-hundred attorneys in its two legal offices: the Office of the General Counsel (OGC) and the Office of Chief Counsel (OCC). OGC provides legal advice and counsel for the Director and the PBGC departments on both ERISA and general law matters, decides administrative appeals of agency decisions concerning benefit coverage and other determinations, and administers the disclosure and other requirements of the Freedom of Information and Privacy Acts. OGC also serves as the gatekeeper for all legislative drafting requests, while OPEA serves as the point of contact and coordinator.

When a technical drafting request is made and accepted, OGC assigns the request to a drafting attorney. OGC’s Office of Legal Policy is responsible for this activity but may bring in experts from across the agency depending on the subject matter. If necessary, these attorneys will coordinate with the policy personnel in OPEA. Once the OGC and OPEA staffs have completed their review and assistance, the proposed legislation with comments is returned to the General Counsel and Deputy Chief Policy Officer for final review and returned to the congressional requester.

C. Role of Agency’s Policy, Regulatory, and Other Personnel

The PBGC’s policy and legislative affairs personnel are part of the Office of Policy and External Affairs (OPEA). The OPEA, led by the Chief Policy Officer, oversees and directs interactions with Congress and Executive Branch agencies and manages the development, analysis, and review of legislative and policy proposals and regulations (though the actual drafting is done by attorneys in the Office of General Counsel).

Policy matters are the responsibility of the OPEA’s Policy, Research, and Analysis Department (PRAD). Policy activity encompasses legislative and regulatory analysis and proposal development related to benefit guarantees, employer liability, plan reporting requirements, and payment of premiums. Research addresses particular pension plan attributes and trends in private sector defined

benefit pension plans, and actuarial and financial issues to support policy development. PRAD's research and technical assistance involve modeling and forecasting the future financial condition of PBGC's insurance programs and future pension contribution requirements of plan sponsors. PRAD employs mostly actuaries and economists and operates the Pension Insurance Modeling System (PIMS). The agency's statutory responsibility is narrow and covers only Title IV of ERISA, not the other labor and tax code provisions of ERISA, which are administered by the Department of Labor, and the Department of the Treasury and the Internal Revenue Service. Moreover, the private sector pension funding requirements and PBGC premium rates are set by Congress through legislation, not by the agencies.

D. Role of Office of Management and Budget

Unless a technical assistance request from Congress is channeled to PBGC through the Office of Management and Budget (OMB), OMB generally plays no role in technical assistance or in modeling. In practice, the PBGC notifies OMB when it is performing modeling and providing significant technical drafting assistance for proposed legislation. When the drafting is complete, OGC will attach a disclaimer to the draft stating that it does not reflect the official policy position of the agency or of the administration.

III. Technical Drafting Assistance as Part of Appropriations Process

The PBGC receives no funding from general tax revenues. Its operations are financed by insurance premiums set by Congress and paid by sponsors of defined benefit plans, investment income, assets from pension plans trusted by PBGC, and recoveries from the companies formerly responsible for the plans.

IV. Effective Practices and Features Implemented at the Agency

1. *Expert Modeling Assistance:* Unlike most other agencies, the PBGC's main technical assistance to Congress involves providing economic modeling of proposed legislation. This is an invaluable resource to Congress, and other agencies with empirical analysis resources may want to consider providing similar technical assistance in the legislative process to improve legislative outputs and to strengthen the agency's relationship with Congress.
2. *Formal OMB Processes:* The PBGC has established an OMB Circular A-19 compliance process overseen by the Office of General Counsel. Employees throughout the agency are instructed to direct all incoming and outgoing communications related to legislative drafting through the OGC, so that OGC can serve as an effective gatekeeper ensure that the agency meets its obligations under Circular A-19.

3. *Policy/General Counsel Coordination:* The PBGC has a Chief Policy Officer with whom the Office of General Counsel confers when drafting legislation; this step assures that the relevant stakeholders are aware of proposed legislation while also giving the policy expert an opportunity to give input on the technical drafting assistance provided by the OGC.